United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

76-6182

B

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6182

STEFANOS ZAOUTIS,

Plaintiff-Appellee.

—v.—

MAURICE KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and IMMIGRATION AND NATURALIZATION SERVICE,

Defendants-Appellants.

UNITED STATES COURT OF APPEALS
FILED
FEB 2 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX OF DEFENDANTS-APPELLANTS

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for Defendants-Appellants.
One St. Andrew's Plaza
New York, New York 10007

PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

PAGE

Docket sheet A1

Summons A2

Complaint A3

Plaintiff's notice to take deposition of deft. INS etc. 3/26/76 ..... A16

Plaintiff's notice of motion for summary judgment and entry of default, ret. 8/6/76, affidavit of Daniel Riesel, Rule 9(g) Statement A18

Plaintiff's memorandum in support of motion A93

Defendant's answer to complaint A131

Defendant's notice of motion for summary judgment, ret. 8/6/76, Affidavit of Thomas H. Belote, Rule 9(g) Statement A137

Memorandum of law in defts cross motion for s/j A186

Plaintiff's memorandum of law in opposition to deft's motion for s/j and in support pltf's motion for s/j A222

Plaintiff's affidavit in opposition to deft's motion for summary judgment A233

Opinion #44959, Plaintiff's motion granted. Defendants cross-motion is denied. Settle order. dtd 8/11/76 Inzer B. Wyatt A237

Order filed 9/13/76, ordered that order of recission entered against pltf Zaoutis by deft INS is declared null and void. dtd 9/13/76, Judge Inzer B. Wyatt, Judgment entered 9/14/76 Raymond F. Burghardt A244

Defendants notice of appeal A246

Clerk's Certificate A246

DATE	NR	PROCEEDINGS
6-10-75	1	Filed Complaint, Issued Summons.
6-17-75	2	Filed summons & marshal's return. Served the following: Maurice Kiley on 6-11-75 U.S. Attorney's Office & The Attorney General, Wash., D.C. by certified mail Receipt #162390 on 6-11-75 Immigration & Naturalization Service on 6-11-75 The Attorney General, Washington, D.C. by certified mail Receipt #162393 on 6-11-75.
9-24-75	2.	Filed Notice that pltff will take deposition of deft on 9-26-76.
01-22-76	3.	Filed pltffs affidavit & Notice of motion for an oder entering summary judgment in favor of pltff rtble on 8-6-76.
06-11-76	4.	Filed pltffs memorandum in support of the motion for summary judgment.
07-01-76	5.	Filed USMAR of deft to the complaint. U.S.Att
07-27-76	6.	Filed defts Affidavit & Notice of Motion for an order granting summary judgment for the defts etc, rtble before Wyatt, J. on 8-6-76.
07-[illegible]-76	7.	Filed memorandum of law in defts cross motion for summary judgment as indicated.
08-05-76	8.	Filed pltffs Affidavit in opposition to defts motion for summary judgment.
08-05-76	9.	Filed memorandum of law in opposition to defts motion etc, as indicated.
08-11-76	10	Filed Opinion #44959. Motion of Pltff. Granted. Cross Motion of Dfts. Denied. Settle Order.....Wyatt J. (mailed notice)
09-13-76	11.	Filed Order and Judgment: Ordered that the order of rescission entered against t pltff by the deft. Immigration and Naturalization Service is hereby declared nul and void. Wyatt, J. Judgment Entered. Clerk.
11-15-76	12.	Filed Notice that defts appeal to the U.S.C.A.P. from the final judgment entere on 9-14-76 as indicated. fe/ir

BEST COPY AVAILABLE

B

SUMMONS IN A CIVIL ACTION

A 2

CIV. 1 (2-64)
(Formerly D.C. Form No.45a Rev. (6-49))

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

75-2783

CIVIL ACTION FILE NO. _____

JUDGE MYAH

STEFANOS ZAOUTIS,

Plaintiff

v.

MAURICE KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and IMMIGRATION AND NATURALIZATION SERVICE,

Defendants

SUMMONS

Answer due
Aug 10-1975
J Tiona

To the above named Defendants:

You are hereby summoned and required to serve upon

DANIEL RIESEL

plaintiff's attorney, whose address 425 Park Avenue
New York, New York 10022

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

RAYMOND BURGHARDT *Clerk of Court.*

B Wasserman *Deputy Clerk.*

Date: June 10, 1975

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STEFANOS ZAOUTIS,

Plaintiff,

-against-

MAURICE KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

COMPLAINT

75 Civil

Plaintiff, STEFANOS ZAOUTIS, by his attorneys, SCHIANO & WALLENSTEIN, and DANIEL RIESEL, alleges for his complaint:

1. This action seeks relief from the Immigration and Naturalization Service's unlawful rescission of the plaintiff's status as a permanent resident of the United States as the rescission occurred five years after the plaintiff's status was adjusted to that of a permanent resident and accordingly is barred and precluded by the terms of the statute authorizing rescission, Section 246(a) of the Immigration and Nationality Act (hereafter "the Act"), 8 U.S.C. § 1156(a).

The Parties

2. Plaintiff, Stefanos Zaoutis, is a native and citizen of Greece, who lawfully entered into the United States on November 6, 1963, as a non-immigrant employee of a foreign government. Mr. Zaoutis has maintained a residence within the United States since his initial entry and has been supported and assisted

by his brother, a United States citizen. Mr. Zaoutis is entitled to an immigrant's visa to the United States by virtue of his brother's citizenship, and pursuant to Section 203(a)(5) of the Act, 8 U.S.C. § 1153(a)(5) would have been able to obtain the benefits of the Act but for the unlawful conduct of the defendant, District Director.

3. The defendant, Maurice Kiley, is the District Director of the New York District of the Immigration and Naturalization Service. The defendant, Immigration and Naturalization Service (hereafter the "Service"), is a branch of the Department of Justice charged with administering the laws of the United States pertaining to the entry, immigration and removal of aliens.

Jurisdiction

4. This Court has jurisdiction over the subject matter of this action pursuant to Section 279 of the Act, 8 U.S.C. § 1329; Title 5 U.S.C. §§ 701 et seq.; Title 28 U.S.C. § 1331, as the value of the matter in controversy exceeds $10,000 exclusive of interests and costs and arises under the Constitution and laws of the United States; Title 28 U.S.C. § 1343(4) and Title 28 U.S.C. § 1346(a)(2).

5. On or about January 10, 1965, the plaintiff entered into a marriage in the City and State of New York with one Fredeswinda Camacho, and thereafter, said Fredeswinda Camacho filed a petition to accord the plaintiff non quota status as a spouse of a United States citizen, pursuant to Section 201(b) of the Act, 8 U.S.C. § 1511(b), and said petition was approved on May 14, 1965, by the defendant.

6. Thereafter, the plaintiff's application for status as a permanent resident of the United States was granted on

August 25, 1965, (hereafter "adjustment date"), pursuant to Section 245 of the Act, 8 U.S.C. § 1255. The plaintiff has maintained a residence within the United States since that date and has conducted himself in a manner becoming a permanent resident of the United States.

Untimely Attempt At
Initiation of Rescission

7. On May 20, 1970, the defendant, Kiley's, predecessor, P. A. Esperdy, the then District Director of the New York District of the defendant Service, mailed the plaintiff, Zaoutis, a letter stating "that the Immigration and Naturalization Service intends to rescind the adjustment of status heretofore granted in your case". The aforesaid letter (hereafter "the letter of intent") alleged, in pertinent part:

> "5. On January 10, 1965 you went through a marriage in New York, New York with Fredeswinda Camacho.
>
> 6. You entered into such marriage ceremony with Fredeswinda Camacho solely for the purpose of obtaining nonquota status under the immigration laws.
>
> 7. You did not intend to enter into a bona-fide marital relationship with Fredeswinda Camacho.
>
> 8. You have never resided with Fredeswinda Camacho as husband and wife and you have never had sexual relations with Fredeswinda Camacho."

8. The letter of intent further informed the plaintiff that he might:

> "Submit within thirty (30) days from the date of service of notice, an answer in writing under oath setting forth reasons why such rescission should not be made."

The plaintiff was also instructed that he might within the same period:

> "request a hearing before a Special Inquiry Officer (also known as an "Immigration Judge") in support of, or in lieu of, a written answer."

9. The applicable regulations purporting to govern the rescission of adjustment of status, Title 8 CFR Part 246, provides that upon the failure of a respondent to answer the allegations within 30 days or to demand a hearing, the District Director "shall rescind the adjustment of status previously granted, and no appeal shall lie from his decision".

10. The aforesaid action of the District Director was commenced under color of Section 246(a) of the Act, 8 U.S.C. § 1256(a). The letter of intent was issued by the District Director pursuant to 8 CFR § 246.1, which requires personal service of such notice upon the alien respondent. Said section further provides that:

> "if it appears to a District Director that a person residing in his district was not in fact eligible for the adjustment of status made in his case, a proceeding shall be commenced by the personal service upon such person of a notice of intention to rescind...."

11. The District Director failed, refused and neglected to conduct a meaningful inquiry as to the allegations contained in the letter of intent prior to mailing it to the plaintiff. The District Director also failed to make any meaningful inquiry or to bring to the attention of the Special Inquiry Officer the results of such meaningful inquiry until after five years from the adjustment date. Moreover, the District Director never effected personal

service of the letter of intent upon the plaintiff, Zaoutis.

Untimely Rescission Hearing

12. Plaintiff's counsel responded in writing to the letter of intent, demanding a hearing within a reasonable period of time and adhering to the practice, permitted under the applicable regulations, did not affirm or deny any of the allegations set forth in the letter of intent.

13 Despite the demand for a reasonably prompt hearing, the defendants' failed, neglected and refused to convene a hearing before a Special Inquiry Officer until more than a year had elapsed after the letter of intent and almost six years subsequent to the date of adjustment.

14. Thus, on June 2, 1971, an initial hearing was convened before a Special Inquiry Officer. At that time, plaintiff moved to terminate the proceedings on the grounds that an action for rescission of his adjustment of status was barred by the five year statute of limitations contained in Section 246(a) of the Act. Plaintiff's counsel also moved the Special Inquiry Officer to terminate proceedings because of a lack of due process alleging, inter alia, that information relating to the plaintiff's case had been induced within the year prior to the hearing by a fraudulent representation that the plaintiff would not be prosecuted and further that the government had lost its right to proceed by failing to promptly bring the rescission issue on for a hearing. The motions were opposed by the Service's Trial Counsel and the Special Inquiry Officer reserved decisions on plaintiff's motions to terminate, gave the Service and plaintiff two weeks to submit briefs and then adjourned the hearing without taking any evidence

or hearing plaintiff's response to the allegations in the letter of intent.

15. The Special Inquiry Officer reconvened the proceedings on April 10, 1972, almost two years after the letter of intent was mailed, and almost seven years after the date of adjustment. The Special Inquiry Officer failed to address himself to plaintiff's motion based on a lack of due process, laches and fraud, but denied plaintiff's motion based on the five year statute of limitations.

16. The Special Inquiry Officer then directed the plaintiff to respond to the allegations set forth in the May 20, 1970 letter of intent. The plaintiff, for the first time, denied the allegation that he had entered into a marriage solely for the purpose of committing a fraud upon the Service.

17. After the plaintiff's response to the letter of intent was received, the Service called the plaintiff as its first witness. The plaintiff was sworn and testified that although the passage of time had created considerable problems with his ability to recall details, he had entered into a legitimate marriage with his wife and he had actually resided with her.

18. After the plaintiff had testified, the Service did not go forward but adjourned the proceedings to October 2, 1972, when it called Fredeswinda Camacho and another witness. Camacho testified that her marriage with the plaintiff was not concummated and that she entered into it for monetary considerations.

19. On October 15, 1973, almost eight years after the plaintiff's status had been adjusted, the Special Inquiry Officer who had been conducting the proceedings, rendered a decision and

order rescinding plaintiff's immigration status pursuant to 8 CFR § 246.6

20. The decision of the Special Inquiry Officer reviewed the evidence adduced at the hearings held on April 10, and October 2, 1972, and concluded that they were conflicting on the crucial factual issues. Nevertheless, the Special Inquiry Officer resolved the issues of credibility in favor of the Service and ended his opinion with the finding that:

> "based on the foregoing, it is concluded that the Service has established by clear, convincing, unequivocal evidence of record that the respondent (Zaoutis) was ineligible for adjustment of immigrant status on August 25, 1965, on the ground that his marriage on January 10, 1965, to Fredeswinda Camacho was a sham marriage entered into with no intent to be a valid and subsisting marriage...."

21. A timely appeal was filed with the Board of Immigration Appeals wherein plaintiff argued that (1) the rescission action was barred by the five year statute of limitations, (2) the action of the Service deprieved the plaintiff of due process of law, (3) the Service had committed error by waiting over a year before affording plaintiff an initial hearing in response to plaintiff's demand for a prompt hearing, (4) the delay in the proceedings was not justified and prejudiced the plaintiff, and (5) the Service failed to submit adequate proof to carry its burden.

22. On May 2, 1974, the Board of Immigration Appeals dismissed the plaintiff's appeal on the grounds that it was not barred by the five year statute of limitations and the evidence supporting the Immigration Judge's fact finding was supported by evidence that was clear, convincing and unequivocal.

FIRST CLAIM FOR RELIEF

23. Plaintiff repeats and realleges the allegations set forth in Paragraphs "1" through "22" of the complaint as if set forth at length.

24. The statute authorizing the rescission of an alien's adjustment of status, Section 246(a) of the Act, 8 U.S.C. § 1156(a), provides:

> "[i]f, at any time, within five years after the status of a person has been . . . adjusted . . . it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person . . . ."

25. Neither the Attorney General nor his putative delegate rescinded the plaintiff's status as a permanent resident within five years of his adjustment of status from a non-immigrant alien to that of a permanent resident contrary to the provisions of Section 246(a) of the Act.

SECOND CLAIM FOR RELIEF

26. Plaintiff repeats and realleges the allegations set forth in Paragraphs "1" through "25" of the complaint as if set forth at length.

27. The Attorney General has delegated certain of his powers and responsibilities relating to the regulation and control of aliens within the United States to the Commissioner of the Service, who, in turn, has attempted to delegate his authority to certain officers of the Service, including District Directors.

District Directors have been delegated certain functions with respect to the initiation and prosecution of rescission proceedings brought pursuant to Section 246(a) of the Act, 8 U.S.C. § 1156(a).

28. District Directors do not have the authority nor have they been delegated authority to rescind an alien's adjustment of status if the alien contests the allegations in the notice. The applicable regulation only authorizes the District Director to notify the alien of the District Director's intent to commence proceedings to rescind.

29. Prior to the service of the letter of intent, the defendant District Director's predecessor failed to conduct an inquiry with respect to the truthfulness of the allegations set forth in the letter of intent and did not take any meaningful steps to ascertain the truthfulness of the allegations prior to August 25, 1970.

30. The defendant District Director's predecessor did not have a reasonable basis for ascertaining whether the plaintiff's marriage with Fredeswinda Camacho was "solely for the purpose of obtaining non quota status under the immigration laws" prior to April 10, 1972. Indeed, the letter of intent was a hastily contrived attempt to deprive the plaintiff of his statutory rights, and it was not until two years later that the Service was prepared to go forward with the presentation of its case for rescission.

31. The defendant District Director's predecessor by placing the letter of intent in the mails did not prevent or toll the five year statute of limitations for a rescission from running

or expiring prior to the purported rescission of the plaintiff's status by the Attorney General's delegates, the Special Inquiry Officer and the Board of Immigration Appeals.

THIRD CLAIM FOR RELIEF

32. Plaintiff repeats and realleges the allegations set forth in Paragraphs "1" through "31" of the complaint as if set forth at length.

33. The Attorney General's apparent grant of authority to the District Director to initiate rescission proceedings is void because of its vagueness and failure to set out proper standards for the action of the District Director.

FOURTH CLAIM FOR RELIEF

34. Plaintiff repeats and realleges the allegations set forth in Paragraphs "1" through "33" of the complaint as if set forth at length.

35. The Service did not undertake to receive evidence in a hearing prescribed by 8 CFR § 246.3 until April 10, 1972, or over six years from the plaintiff's adjustment date.

36. The Service did not finish its introduction of evidence and conclude its prima facie case for rescission until October 2, 1972, or over seven years after the plaintiff's adjustment date.

37. The Special Inquiry Officer was not able to determine that there was sufficient evidence to support a finding that the plaintiff was ineligible for adjustment of status until October 15, 1973, or until eight years after the plaintiff's

adjustment date.

38. This failure, neglect and refusal of the Service to submit evidence of a prima facie case for rescission until five years had elapsed bars and precludes the Attorney General or his delegates from lawfully rescinding the plaintiff's status.

FIFTH CLAIM FOR RELIEF

39. Plaintiff repeats and realleges the allegations set forth in Paragraphs "1" through "38" of the complaint as if set forth at length.

40. The applicable regulations purport to delegate the Attorney General's authority under Section 246(a) of the Act to rescind an adjustment of status if at any time within five years of the status having been granted, it shall appear to the Attorney General's satisfaction that the person was not in fact eligible for such adjustment of status, to a Special Inquiry Officer.

41. The Special Inquiry Officer did not receive the plaintiff's answer to the letter of intent or receive any evidence of record until six years after the plaintiff's adjustment of status,and accordingly, it could not appear to the satisfaction of the Attorney General's delegate that the plaintiff was not in fact eligible for such adjustment of status.

SIXTH CLAIM FOR RELIEF

42. Plaintiff repeats and realleges the allegations set forth in Paragraphs "1" through "41" of the complaint as if set forth at length.

43. The failure, refusal and neglect of the Special

Inquiry Officer to make findings of fact within five years of the plaintiff's adjustment date bars and precludes the Attorney General and his delegate from rescinding plaintiff's status.

SEVENTH CLAIM FOR RELIEF

44. Plaintiff repeats and realleges the allegations set forth in Paragraphs "1" through "43" of the complaint as if set forth at length.

45. Section 246.7 of Part 246, 8 CFR provides for the appeal to the Board of Immigration Appeals from the decision of a Special Inquiry Officer made in a rescission proceeding.

46. The failure and inability of the Board of Immigration Appeals to render a decision sustaining the Special Inquiry Officer's decision within five years of the plaintiff's adjustment date bars and precludes the Attorney General and his delegates from rescinding the plaintiff's immigration status.

EIGHTH CLAIM FOR RELIEF

47. Plaintiff repeats and realleges the allegations set forth in Paragraphs "1" through "46" of the complaint as if set forth at length.

48. Defendants affirmatively and unreasonably delayed the commencement of an actual hearing in plaintiff's deportation proceedings although they were aware of the plaintiff's demand for prompt hearing.

49. The actions of the defendants caused the unreasonable delay and during the delay prejudiced the plaintiff and denied him due process of law.

NINTH CLAIM FOR RELIEF

50. Plaintiff repeats and realleges the allegations set forth in Paragraphs "1" through "49" of the complaint as if set forth at length.

51. The decision of the Special Inquiry Officer and the Board of Immigration Appeals to rescind the plaintiff's status was not supported by clear, convincing and unequivocal evidence of record and was arbitrary and capricious and contrary to law.

WHEREFORE, plaintiff demands judgment on claims FIRST through NINTH, reversing the decisions of the Special Inquiry Officer and the Board of Immigration Appeals, restoring the plaintiff's status as a lawful permanent resident and the entry of an Order directing the Attorney General from further interference with his right to remain in the United States, and for the costs of this action, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
June 10, 1975

Yours, etc.

SCHIANO & WALLENSTEIN
DANIEL RIESEL
Attorneys for the Plaintiff

By Daniel Riesel
DANIEL RIESEL
Office and Post Office Address
425 Park Avenue
New York, New York 10022
Tel. No. (212) 421-2150

A 16

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

STEFANOS ZAOUTIS,

Plaintiff,

-against-

MAURICE KILLY, as District Director for the New York District of the Immigration and Naturalization Service, and IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

----------x

NOTICE OF DEPOSITION

75 Civil 2783 (IBW)

S I R :

PLEASE TAKE NOTICE that at 10:30 A.M. on March 26, 1976 at the offices of Daniel Riesel, Esq., 425 Park Avenue, New York, New York 10022, plaintiff Stefanos Zaoutis will take the deposition upon oral examination of the defendant Immigration and Naturalization Service by a person having knowledge of the contents and the physical custody of the administrative file relating to Stefanos Zaoutis maintained by the said Immigration and Naturalization Service before a notary public or before some other officer authorized by law to administer oaths.

Said examination will continue from day to day until completed. You are invited to attend and cross examine.

Defendant Immigration and Naturalization Service is required to produce upon such deposition the administrative file maintained by said defendant relating to Stefanos Zaoutis, and all books, papers, records, correspondence, documents and memoranda in its custody or under its control which relate to the subject matter of this action, provided, however, that defendant may delete

material that would tend to compromise investigations or reveal the identities of heretofore unknown informers.

Dated: New York, New York
March 18, 1976

Yours, etc.,

Daniel Riesel and Schiano & Wallenstein
Attorneys for the Plaintiff

By _____

Daniel Riesel, Esq.
Winer, Neuburger & Sive
425 Park Avenue
New York, New York 10022
(212) 421-2150

TO:

Thomas Belote, Esq.
Special Assistant United
States Attorney
Courthouse Annex
One St. Andrews Plaza
New York, New York 10007

M. Belote
75-2021
mjb

A 18

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

STEFANOS ZAOUTIS,

Plaintiff,

-against-

MAURICE KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and the IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

----------x

75 Civil 2783 (IBW)

NOTICE OF MOTION FOR SUMMARY JUDGMENT AND ENTRY OF DEFAULT

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affidavit of Daniel Riesel, Esquire, sworn to the 21st day of June, 1976, the plaintiff will move this Court on the 2nd day of July, 1976 at 2:30 P.M. in the forenoon or as soon thereafter as counsel can be heard in Room 1506 in the United States Courthouse, Foley Square, New York, for an order pursuant to Rule 55(a) and (e) of the Federal Rules of Civil Procedure, and for an order pursuant to Rule 56(a) Federal Rules of Civil Procedure entering summary judgment in favor of plaintiff, and for such other and further relief as to this Court may deem just and proper.

M.f.D.

Dated: New York, N.Y.
June 21, 1976.

Yours, etc.,

SCHIANO & WALLENSTEIN and
DANIEL RIESEL

By: Daniel Riesel
Daniel Riesel
Attorneys for Plaintiff
425 Park Avenue
New York, N.Y. 10022

TO: ROBERT B. FISKE, ESQUIRE
United States Attorney for
the Southern District of New York
Attorney for Defendants
1 St. Andrews Plaza - Courthouse Annex
New York, N.Y. 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

STEFANOS ZAOUTIS,

Plaintiff,

-against-

MAURICE KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and the IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

- x

75 Civil 2783 (IBW)

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND ENTRY OF DEFAULT

STATE OF NEW YORK)
):SS:
COUNTY OF NEW YORK)

DANIEL RIESEL, being duly sworn deposes and says:

1. I am one of the attorneys for the plaintiff, Stefanos Zaoutis. I am familiar with the material facts herein as those facts are drawn from the administrative record and are of my personal knowledge. I make this affidavit in support of plaintiff's motion for summary judgment and the entry of default against the defendants, officerand agency of the United States.

2. This action seeks relief from the act of the defendant Immigration and Naturalization Service's decision to rescind the plaintiff's status as a permanent resident of the United States as the rescission occurred five years after the plaintiff's status was adjusted to that of a permanent resident and accordingly is barred by the terms of the statute that authorizes such rescission, Section 246(a) of the Immigration and Nationality Act (hereafter "the Act"), 8 U.S.C. § 1156(a).

The Parties

3. The plaintiff, Stefanos Zaoutis, is a native and citizen of Greece, who lawfully entered the United States on November 6, 1963 as a non-immigrant employee of the Government of Greece.

4. Zaoutis was born in 1940 on the small Aegean Island of Ikaria. He spent the first twenty years of his life on Ikaria in a small farming village called Brakades. The standard of living in Brakades has long been depressed as the farms are no longer capable of supporting the families that own them. In 1960, Zaoutis was conscripted into the Greek Navy. Upon his discharge, his family was able to obtain a job for him as a clerk in the Greek Consulate in New York City. His duties included serving as a doorman and giving directions to people entering the consulate. Zaoutis has maintained a residence within the United States since that initial entry. He has been supported and assisted by his brother who is a United States citizen. Mr. Zaoutis is employed in the restaurant business and has been regularly employed working as many as sixteen hours per day, seven days per week.

Aside from his initial basis for permanent residence, Mr. Zaoutis is entitled to an immigrant's visa to the United States by virtue of his brother's citizenship, and pursuant to Section 203(a)(5) of the Act, 8 U.S.C. § 1153(a)(5). He would have been able to obtain the benefits of that section of the Act's provisions but for the unlawful rescission which has practically barred the submission of that petition for an immigrant's visa by plaintiff's brother.

5. The defendant, Maurice F. Kiley, is the District Director of the New York District of the Immigration and Naturalization Service (hereafter "the Service"). The Service is a branch in the Department of Justice charged with the administering the laws of the United States pertaining to the entry of immigrants and removal of aliens. Kiley's predecessor initiated rescission proceedings against the plaintiff, Zaoutis. These proceedings which plaintiff contends violated his statutory rights, is the subject of this action.

History of the Litigation

6. On May 20, 1970, the defendant, Kiley's predecessor, P.A. Esperdy, the then District Director of the defendant Service mailed the plaintiff, Zaoutis, a letter which purported to initiate certain administrative proceedings which were intended to revoke Zaoutis' status as a permanent resident of the United States. That letter and the proceedings will be discussed at length below. An Administrative Judge, then known as a Special Inquiry Officer conducted the proceedings, and on October 2, 1972 entered an order rescinding the permanent status of the plaintiff. A timely appeal was filed with the United States Board of Immigration Appeals, but on May 2, 1974 the Board of Immigration Appeals dismissed the plaintiff's appeal.

7. Thereafter on June 10, 1975, the instant action was commenced in this Court. The Marshal's return indicates that personal service was effected on the defendant Maurice Kiley on June 11, 1975. The Marshal's return also indicates that the

United States Attorney for the Southern District of New York was similarly served and that service upon the Attorney General of the United States was completed on that day by the use of certified mail. The defendant officer and agency of the United States have not appeard, answered or moved with respect to the instant complaint. In September 1975 and thereafter, your deponent spoke to the Special Assistant to the United States Attorney, in charge of immigration matters, who indicated that she was aware of the filing of this case and would attempt to remedy the absence of responsive pleadings and motions.

Untimely Attempt at Initiation of Rescission

8. Prior to January, 1965, Zaoutis worked for the Government of Greece in the City of New York and was in no danger of being deported. In addition thereto, his brother was a United States Citizen and could have submitted a timely petition to adjust Zaoutis' status from that of a temporary resident to that of a permanent resident. However, on or about January 10, 1965 Zaoutis entered into a marriage in the City of New York with a woman named Fredeswinda Camacho. Thereafter, Mrs. Zaoutis (nee Camacho) filed a petition to accord the plaintiff nonquota status as a spouse of a United States Citizen pursuant to Section 201(b) of the Act 8 U.S.C. 1511(b). The defendant Service approved that petition on May 10, 1965. Thereafter, the next step in changing an alien's status from one of a temporary status to that of a permanent resident was granted on August 25,

1965 pursuant to Section 245 of the Act, 8 U.S.C. § 1255. This process is usually referred to by the Service as "adjustment of status" and the date that Zaoutis' status was adjusted will be hereafter referred to as the "adjustment date".

9. As indicated, on or after May 20, 1970, Kiley's predecessor, P.A. Esperdy, acting as the District Director of the New York District of the defendant Service mailed the plaintiff a letter stating "that the Immigration and Naturalization Service intends to rescind the adjustment of status heretofore granted in your case". The aforesaid letter (hereafter "the letter of intent")is attached hereto and incorporated herein as Exhibit A.

10. The letter of intent in pertinent part stated:

> "5. On January 10, 1965 you went through a marriage in New York, New York with Fredeswinda Camacho.
>
> 6. You entered into such marriage ceremony with Fredeswinda Camacho solely for the purpose of obtaining nonquota status under the immigration laws.
>
> 7. You did not intend to enter into a bona-fide marital relationship with Fredeswinda Camacho.
>
> 8. You have never resided with Fredeswinda Camacho as husband and wife and you have never had sexual relations with Fredeswinda Camacho."

11. The letter of intent further informed the plaintiff that he might:

> "Submit within thirty (30) days from the date of service of notice, an answer in writing under oath setting forth reasons why such rescission should not be made."

The letter of intent also instructed the plaintiff that he might within the same period:

"request a hearing before a Special Inquiry Officer in support of, or in lieu of, a written answer."

12. The applicable regulations, governing the rescission of adjustment of status, Title 8 CFR, Part 246, did not leave Zaoutis much of a choice as to his course of action. That regulation provides that upon the failure of a respondent to answer the allegations within thirty days or to demand a hearing, the District Director "shall rescind the adjustment of status previously granted, and no appeal shall lie from his decision."

13. Plaintiff's then counsel responded in writing to the letter of intent demanding a hearing within the reasonable period of time and adhering to the practice permitted under the applicable regulation, and did not confirm or deny any of the allegations set forth in the letter of intent (counsel's letter is attached hereto and incorporated herein as Exhibit B). However, despite this demand for a reasonably prompt hearing, the defendants failed to convene a hearing before a Special Inquiry Officer until more than a year had elapsed after the letter of intent had been issued and significantly almost six years subsequent to the adjustment date.

14. On June 2, 1971, the initial hearing was convened before a Special Inquiry Officer. At that time plaintiff moved to terminate the proceedings on the grounds that an action for rescission of his adjustment of status was barred by the five year time limitation contained in Section 246(a) of the Act. Plaintiff's counsel also moved the Special Inquiry Officer to terminate the proceedings because of a lack of due process alleging, inter alia, that information relating to the plaintiff's

case had been induced within the year prior to the hearing by a fraudulent representation that the plaintiff would not be prosecuted and further that the government had lost its right to proceed by not promptly bringing the rescission issue on for a hearing. These motions were opposed by the Service's Trial Counsel and the Special Inquiry Officer reserved decision on plaintiff's motion to terminate, gave the Service and plaintiff two weeks to submit briefs and then adjourned the hearings without taking any evidence or hearing plaintiff's response to the allegations in the letter of intent.

Evidence Received at Trial

15. The Special Inquiry Officer reconvened the rescission proceedings on April 10, 1972, almost two years after the letter of intent was mailed and almost seven years after the adjustment date. At that point, the Special Inquiry Officer had not received any evidence or offer of proof whatsoever that would tend to indicate that plaintiff's adjustment of status should be rescinded. Strangely, the Special Inquiry Officer failed to address himself to plaintiff's motion based on a want of due process, laches and fraud. However, he denied plaintiff's motion which was based on the five year statute of limitations, and directed the plaintiff to respond to the allegations set forth in the May 20, 1970 letter of intent.

16. The plaintiff, for the first time, denied the allegations that he entered into a marriage solely for the purpose of committing a fraud upon the Service. After the plaintiff's response to the letter of intent was received, the Service called

the plaintiff as its first witness. The plaintiff was sworn and indicated that although the passage of time had created considerable problems with his ability to recall details, he had entered into a legitimate marriage with Fredeswinda Camacho and he testified that he had actually resided with her. Upon the completion of the plaintiff's testimony, the Service failed to go forward but adjourned the proceedings another six months to October 2, 1972 at which time it called Fredeswinda Camacho and another witness, Angel Luis Collazo. Camacho testified that her marriage with the plaintiff was not consummated and that she had entered into such a marriage purely for monetary considerations. (A copy of the transcript of administration proceedings is attached hereto and incorporated herein as Exhibit C).

17. On October 15, 1973, almost eight years after the plaintiff's status had been adjusted, the Special Inquiry Officer who had been conducting the proceedings rendered his decision and order rescinding plaintiff's immigration status pursuant to 8 CFR § 246.6. The decision of the Special Inquiry Officer (by then referred to as an "Immigration Judge") is attached hereto and incorporated herein as Exhibit D. The Immigration Judge reaffirmed his prior decision that the defense based upon the five year time base was not available to the plaintiff. The Immigration Judge then reviewed the conflicting testimony and found that the testimony of Fredeswinda Camacho and the other government witness was totally credible and that the testimony of the respondent appeared to be totally incredible. Accordingly, he ordered rescission of the plaintiff's immigration status.

Administrative Appeal

18. Zaoutis filed a timely appeal with the Board of Immigration Appeals, an agency of the Department of Justice empowered to hear appeals in rescission hearings pursuant to 8 CFR § 246.7. Oral argument before the Board was heard on January 21, 1974, and on May 2, 1974 the Board entered an order dismissing the appeal. The Board's decision is attached hereto and incorporated herein as Exhibit E.

19. The decision of the Board of Immigration Appeals stated:

> "At oral argument before us, counsel for the respondent...relied solely on the statute of limitations argument, asking that we recede from our holding in Matter of Singh, 13 I & N Dec. 439 (BIA 1969), sustained in Singh v. INS, 456 F.2d 1092 (9 Cir. 1972), cert. denied 409 U.S. 847. We see no reason to do so, and adhere to it."

The Board of Immigration Appeals also stated that "fact findings are supported by evidence which is clear, convincing and unequivocal."

Government's Absence of Knowledge

20, In the complaint served on June 10, 1975, Zaoutis alleged that the District Director did not have the requisite knowledge to satisfy the statutory requirements of Section 246(a) of the Act (see e.g. paragraph 30, Second Claim for Relief). Despite repeated requests for the government to respond to the complaint, the government failed to do so. Because of the

requirements of Rule 55(e), Federal Rules of Civil Procedure, preparation of the case went ahead. It became apparent that Zaoutis might be required to show just what the District Director knew within the five year period. Accordingly, the Special Assistant United States Attorney in charge of this case was requested to permit your deponent to examine the administrative file relating to Zaoutis and maintained by the Service.

21. After several telephone calls with the Special Assistant in February 1976, it became apparent that the government was without any reasonable basis resisting the production of Mr. Zaoutis' administrative file. However, on February 19th, I responded to a request to the Special Assistant to put my demand for production in writing. Despite the assurances from the government's counsel that the written request would be promptly honored, no response was made and my request was ignored. Accordingly, on March 18, 1976, I noticed the defendants for depositions by "a person having knowledge of the contents and the physical custody of the administrative file relating to Stefanos Zaoutis maintained by the said Immigration and Naturalization Service ...." A copy of the Notice of Deposition is attached hereto as Exhibit F. The government now responded stating that in lieu of a formal deposition, that it would produce the file and permit it to be examined. Accordingly, on the date and time noticed for the deposition, I appeared in the office of the Special Assistant in charge of this matter and the file was turned over. However, at that time, the government stated that numerous investigative reports and other materials had been removed from

the file immediately prior to its production and that "tabs" had been inserted in the file to indicate material removed. Thus, under the first "tab" indicating material removed from the file six investigatory memos had been removed. They were identified as investigations dated September 9, 1970, October 7, 1970, November 3, 1970 and January 25, 1971 and another undated investigation. The second "tab" indicated that a memo to the file dated May 27, 1970 had been removed. Similar material had been removed at "tab" 3. At "tab" 4, more investigatory reports had been removed.

22. The government was requested to reconsider its refusal to produce the material from the file, but no reconsideration has been forthcoming..

23. The file did reflect that Zaoutis was requested to appear before an investigator of the Service on May 11, 1970, but when he appeared he requested an adjournment so that he could obtain an attorney. His request was granted but the Service never had Zaoutis return.

24. For some reason, the government left in the administrative file the affidavit of Ms. Camacho, dated March 25, 1969. That affidavit recites in pertinent part.

> "My name is Fredeswinda Camacho. I was married to Stefanos Zaoutis and my name is Fredeswinda Zaoutis....I met Stefanos at the World's Fair in the last part of October, 1964. We went together for three or four months. He asked me to marry him and I accepted his proposal. Before we were married, I lived at 1138 DeKalb Avenue, Brooklyn, New York. When we married we found an apartment at 226 Central Avenue....and we lived there together for eight or nine months. We began to have arguments and he finally moved out....I married my husband for love...."

The government also left in the administrative file a subsequent sworn statement by a Miss Camacho to the effect that her marriage was fraudulent. Thus, the file contains clearly contradictory affidavits and nothing else that would tend to indicate that Zoutis had obtained his status by fraud.

25. Tne file also contained evidence of bureaucratic abuse.

Thus, in October 1967, Zaoutis obtained a divorce and went back to his native Ikaria, where he married a childhood acquaintance. He then filed a petition to bring her new wife to the United States. However, attached to the Zaoutis' petition was a brown unmarked envelope. A single sheet of paper was enclosed and written in bold red letters on it was: "The petitioner gained his permanent residence through marriage fraud. Do not adjudicate this petition without considering this aspect [signed] J.H. Peterson.".

26. Thus, the government produced certain documents pursuant to the Federal Rules of Civil Procedure and those documents clearly indicate that the District Director could not have been satisfied that Zaoutis had, in fact, engaged in any fraudulent practice prior to the receipt of evidence of record in the administrative hearing.

WHEREFORE, it is prayed that the Court enter an order providing for the default of the defendants, or in the alternative, summary judgment.

Daniel Riesel

Daniel Riesel

Sworn to before me this
21st day of June, 1976.

Notary Public, State of New York
No. 41-4614052
Cert. Filed in Queens County
Commission Expires March 30, 1977

A 31

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
20 WEST BROADWAY
NEW YORK, NEW YORK 10007

May 20, 1970

A13 942 820
ZAOUTIS, Stefanos

Mr. Stefanos Zaoutis
3508 24th Avenue
Astoria, L.I.C., New York 11102

RE: Notice of intention to rescind adjustment of status under Section 246 - Immigration and Nationality Act.

Dear Sir:

Please take notice that the Immigration and Naturalization Service intends to rescind the adjustment of status heretofore granted in your case. It is herein alleged that:

1. You are not a citizen or national of the United States.

2. You are a native and citizen of Greece.

3. You last entered the United States at New York, New York on November 6, 1963.

4. You were then admitted as a nonimmigrant employee of a foreign government.

5. On January 10, 1965 you went through a marriage in New York, New York with Fredeswinda Camacho.

6. You entered into such marriage ceremony with Fredeswinda Camacho solely for the purpose of obtaining nonquota status under the immigration laws.

7. You did not intend to enter into a bona-fide marital relationship with Fredeswinda Camacho.

8. You have never resided with Fredeswinda Camacho as husband and wife and you have never had sexual relations with Fredeswinda Camacho.

9. A petition filed by Fredeswinda Camacho to accord you nonquota status as the spouse of a United States citizen was approved May 14, 1965.

10. On the basis of such approved petition, your application for status as a permanent resident was granted on August 25, 1965.

EXHIBIT - A

A 32

Mr. Stefanos Zaoutis A13 942 820

On the basis of the foregoing allegations, it is charged that you were not, in fact, eligible for the adjustment of status granted in your case, in that you were not entitled to the nonquota status accorded you as the spouse of a citizen of the United States at the time of such adjustment. Accordingly, such status is subject to rescission under Section 246 of the Immigration and Nationality Act.

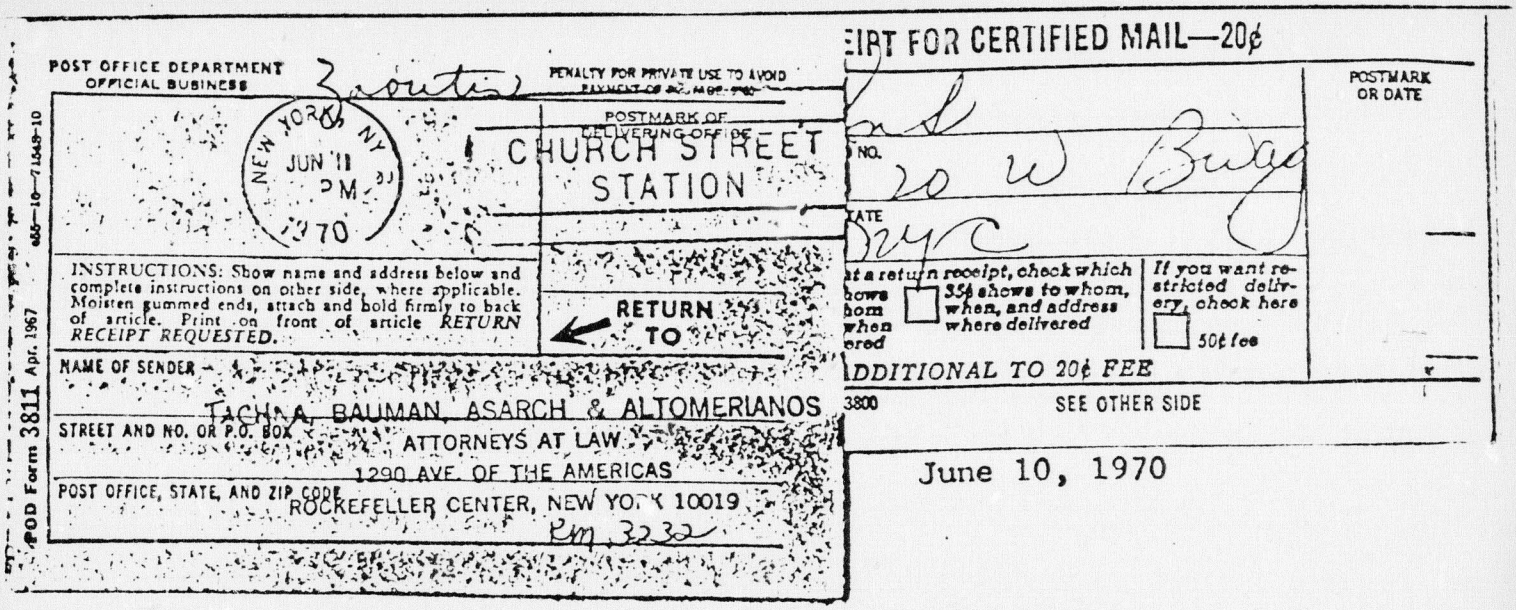
You are informed that you may submit, within thirty (30) days from the date of service of this notice, an answer in writing under oath setting forth reasons why such rescission should not be made. You may also within that time request a hearing before a Special Inquiry Officer in support of, or in lieu of, a written answer. You may have the assistance of or be represented by an attorney or other representative authorized to practice before the Immigration and Naturalization Service, without expense to the Government, in the preparation of your answer or in connection with your hearing, and you may present such evidence as may be relevant to the rescission proceeding.

Very truly yours,

P. A. Esperdy

P. A. ESPERDY
District Director
New York District

Certified Mail
Return Receipt Requested



June 10, 1970

Immigration and Naturalization Service
20 West Broadway
New York, New York 10007

Attention: Mr. P. A. Esperdy
District Director

RE: Stefanos ZAOUTIS
A13 942 820

Dear Sir:

With reference to your letter dated May 20, 1970 addressed to Stefanos Zaoutis, please be advised that I have been retained as counsel by the alien and enclosed is a G-28 Notice of Appearance for said purpose.

Please be further advised that the alien requests a hearing before a special inquiry officer concerning the allegations made in your letter of May 20, 1970.

The original of this letter is being submitted by hand at the cashier's window.

For information purposes I will be leaving the United States on June 29, 1970 and not returning until July 27, 1970. Accordingly, should a hearing be scheduled, it should either be before or after these dates so that the alien may be represented at such time.

Very truly yours,

NICHOLAS PAUL ALTOMERIANOS

NPA/rsk
BY HAND
cc: by certified mail

A 33 EXHIBIT B

A 34

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

MATTER OF

FILE A 13 942 820 - New York

STAFANOS ZAOUTIS

IN RESCISSION PROCEEDINGS

-Respondent-

TRANSCRIPT OF HEARING

Before Special Inquiry Officer Joseph J. Mack

Hearing held on June 2, 1971 at 20 West Broadway, New York, N.Y.

Recorded by Dictabelt Transcribed by P.J. Killela

Official Interpreter Mrs. Magdalena Tsopanakos Language Greek

IN BEHALF OF SERVICE:

~~Nathan Levine, Esq.,~~
Trial Attorney

New York, N. Y.
Station

IN BEHALF OF RESPONDENT:

~~Nicholas Altomarianos, Esq.,~~
1290 Avenue of the Americas

New York, N. Y.

(of Counsel: Tachna, Bauman, Asarch, & Altomarianos, Esqs.,)

I hereby certify that to the best of my knowledge and belief the following pages numbered -1- through -9- are a complete and accurate transcript of the above-described hearing.

Signature

Special Inquiry Officer
Title

Date

EXHIBIT C

Form I-297

SIO TO THE RESPONDENT (through the interpreter):

Q What is your full true and correct name?

A My name Stefanos Zaoutis.

Q Do you live at 3508 24th Avenue, Astoria, Long Island?

A Yes, sir.

Q Do you speak and understand the English language?

A Well, some, but not very well.

Q Do you understand the Greek language spoken by the interpreter?

A Yes.

Q If at any time you should not understand a question translated to you in Greek, say so, and the question will be explained to you. But if you answer the question I will believe that you have understood what the question means. Do you understand what I am saying?

A Yes.

Q I advise you that you are before me today to get a hearing in the matter of rescission of the adjustment of your immigration status. Do you understand?

A Yes.

Q At this hearing do you wish to be represented by Mr. Altomarianos?

A Yes.

SIO: Counsel, are you ready to proceed?

COUNSEL: Yes, we are, Mr. Mack. If I may have the opportunity even before we proceed to make a statement.

SIO: I will let you make a statement off the record because any statement you make is not evidence. If you wish to make a statement off the record, I will give you the opportunity.

COUNSEL: Fine.

SIO: First of all, Counsel, the hearing has not been commenced. So you can't make any legal requests. I merely advised him of the action and I want to know whether you are ready to proceed?

MR. ALTOMARIANOS: We are ready to proceed.

SIO: Mr. Levine, are you ready?

MR. LEVINE: The government is ready.

SIO: Now, Counsel, you may proceed with any application you desire.

MR. ALTOMARIANOS: On behalf of the respondent, we request that you as Special Inquiry Officer order that these proceedings be terminated and nothing be done further on the ground that this particular action is barred by the statute of limitations and I present as my legal basis for it, two cases, Tanner v. Holland, 255 Fed. 2d 61, and a recent case reversing the Board decision SING v. INS, 313 Fed. Supp. 532, in both cases which the court held to the rule that the five year limitation provision does not hold when the plaintiff, the respondent in this case, is served with notice of intent to rescind.

SIO: If my recollection is correct, Counsel, there was some amendment by regulation relative to rescission cases. Am I right in that, Mr.Levine?

MR. LEVINE: You are right, Mr. Hawk, that has been amended so that the statute of limitations shall not stop, if the notice of rescission is served before the expiration of the five year statute, it is not longer necessary for the final judgment or decision in a rescission case occur or be delivered prior to the expiration of the five years.

MR. ALTOMARIANOS: It is my opinion if such an amendment exists, and I believe, I take your word that it does, it does not apply in the case retroactively, and the notice was sent in this case....

sio: If we may take a recess at this time, Mr. Levine will have an opportunity to present the regulation and the effective date of the regulation.

SIO: Mr. Levine will you make a statement on the record in light of the fact I apparently was under a misapprehension that there was a regulation which amended the situation relative to the statute of limitations. I will let you make your statement.

MR. LEVINE: Yes, Mr. Mack. I have submitted the case of Matter of Sing, a Board decision, an Interim Decision 2017 which holds that the service of the notice of intention to rescind tolls the statute of limitation and is not necessary in a 246 proceeding thereafter to have a final adjudication within the five year statutory period....

SIO: I know, but Mr. Altomarianos has indicated that the Matter of Sing was reversed by the Circuit Court for 9th Circuit...

MR. LEVINE:...yes, I was going to continue, to tell you sir, that I do know of the reversal of that Board's decision by the Circuit Court of Appeals in the 9th Circuit...

SIO: ...the District Court of California...

MR. LEVINE....I'm sorry yes, the District Court of California, Ninth Circuit. We have been informed by the Central office in Washington that the Board decision on Matter of Sing is the one that we should adhere to...

SIO: But that doesn't mean I have to adhere to it. What you want to adhere to is immaterial...

MR. LEVINE: Mr. Mack, I am aware of that, and I am choosing my phraseology carefully that we - meaning I - in no sense do I ever speak for you, sir. That we, as Trial Attorneys in the New York District, as the legal arm of the District Director, are to adhere to the decision of the Board in Matter

of Sing, and not to adhere to the reversal thereof by the District Court in the Ninth Circuit.

SIO: Mr. Altomarianos and Mr. Levine. I will reserve my decision on the motion, and I request that you submit briefs on the question. However, since I am reserving my decision, I will permit the government to present its case, subject to whatever ruling I make on the motion...

MR. LEVINE: I understand however, Mr. Mack, that Mr. Altomarianos has a number of other requests to make of you also at this time...

SIO: I will give him the opportunito to do so now.

MR. ALTOMARIANOS: Well, first, in regard to your reserving your decision but indicating that you feel the government should proceed, we would object to that on the ground that it would be wholly unfair, and without any precedent, to a respondent, for a case to proceed before decision were made whether the action itself would be off the ground. We make our first objection there. Two, I would object to the respondent being sworn in and his testimony taken on the further ground that the government - in this case - themselves - after the first notice of intention was served, failed to proceed in this case, and should be estopped from proceeding in this case on the grounds of committing, what I would like to loosely term - a fraud, committed upon the respondent. I use that loosely without any bad word. This respondent had been requested by this Service to enter into a discussion with the Service and if possible offer testimony and evidence against a third party in cooperation with the Service. Negotiations proceeded, various meetings were held, and as a result of these meetings, for one reason or another, the attorney representing a particular coordinating committee which was presenting evidence against a third party, first decided not to use this respondent's testimony. That attorney was replaced by

another who indicated that he wanted to....

MR. LEVINE: Mr. Mack, I don't wish to be rude...

SIO: I don't think that's material.

MR. LEVINE: ...but Mr. Altomarianos is going completely outside the scope of this hearing before you now. I hesitated to interrupt him before but I don't think that that is really relevant to the issue.

SIO: I am not inclined to think that this particular phase, that has been repealed without making any specific finding one way or the other, is relevant..

MR. ALTOMARIANOS: I understand your position. Our position would be to request the SIO to further order the proceedings not be opened but that the government should be estopped from these proceedings based upon their own failure to bring them on, without any thought of this respondent - putting in jeopardy his rights as a result of the fraud which was committed and third, I would not have this respondent at any time sworn in and give any testimony on the ground that I think he has no obligation to testify here, as I have stated in a former case I handled...

SIO: Because you handled a case and took up such a posture at one time does not now make it law...

MR. ALTOMARIANOS: I agree with you Mr. Mack, but it's our position...

SIO: My observation of the situation is that the government has a right to call anybody as a witness. What position may be taken once he is called as a witness will be determined based upon the situation we then arrive at.

MR. ALTOMARIANOS: My only position again, is a question of law and not what my desire is for it to be. This respondent cannot be called as a witness against himself. He has the right to....

SIO: Mr. Altomarianos, you are sufficiently knowledgeable as a lawyer that any party to any proceeding may call in the principal party of the opposition as a witness - in any proceeding - any legal proceeding.

MR. LEVINE: Mr.Mack may I be heard. If Mr. Altomarianos is finished, I would like to reply to what actually amounts to a motion to dismiss being made to you. If my memory does serve me correctly, at the outset of this hearing, Mr. Altomarianos requested before the hearing actually went into operation that he make certain motions to you, or certain requests to you, with regard to the legality of the proceedings here. May I inform Mr. Altomarianos through you, sir, that the government's presentation of the case has not as yet begun .We are perfectly capable, ready and anxious to go ahead, with the presentation of evidence. With regard to the second motion in effect, tht was it was the plees made by Mr. Altomarianos, I don't think with all due respect that it should be countenanced by you , if the government's position is correct, that the Service by its notice of intention to rescind within the five years statutory period is sufficient a complaint made by Mr.Marianos, which actually amounts to Laches is completely irrelevant and immaterial.

SIO: Well I am inclined to agree that the government is not estopped by the mere fact that they did not proceed with the hearing. At least, well, I do not know at this time, the basis of the delay in bringing the matter up for trial.I cannot make an affirmative finding...

MR. ALTOMARIANOS: Perhaps....

SIO: ...I will not at this time weigh respondent's motion on the basis of the fact that there is no evidence before me on which I could make a finding. Counsel may reserve his right to renew his motion when some concrete evidence

is in the record. I will then make a ruling. Any other motion you have, Counsel?

MR. ALTOMARIANOS: No, Mr. Mack, I would like to reserve my right on that but my main point is in view of the fact that you have reserved decision on deciding whether we should begin or not, I think..

SIO:....I didn't reserve my decision on whether we should begin or not.. I reserved a decision on your motion to dismiss the proceeding on the ground that it is barred by the statute of limitations..

MR. ALTOMARIANOS: Well, I address myself to that and I correct myself and my phraseology. Until that decision is made I think there should be no proceeding, because there is no point in now proceeding and then deciding later that we shouldn't have proceeded, and I don't think well, any purpose is served. Hear my position, we have waited a year since the notice of intention has been served. If the government's position is correct and upheld a few more weeks or whatever it is won't matter when the proceeding would begin. So I'm saying until your decision comes down, I don't see why we would be proceeding. When we can see which way it will go and the government wishes to take an appeal, fine, but if the government is upheld then it is only a matter of a little bit more time for this proceeding to get off the ground and I don't see why we should proceed today in view of that.

MR. LEVINE: With all due respect to you, sir and Mr.Mack, I am not in disagreement with Mr. Altomarianos...

SIO: Have you decided too, that I have no objection to adjourning the case?

MR. LEVINE:.....however, may I continue sir. Conditioned by a time limitation..

MR. ALTOMARIANOS: I fully agree.

SIO: How much time will you need to submit a brief, Counsel?

MR. ALTOMARIANOS: Ten days.

SIO: Mr. Levine, how much time will you need?

MR. LEVINE: Well the actual period agreeable .. no no, I will prepare my brief simultaneously with the preparation of the brief by Mr. Altomarianos and submit - both be submitted to you within a period of two weeks.

SIO: Then, I will adjourn this hearing - I will give both of you until June 16, 1971 to submit briefs. In the event that I should grant the motion to dismiss, an order will be served to that effect. In the event however that the motion should be deemed denied, or I be prepared to deny the motion, then the hearing will be considered continued and arrangements will be made as to the rescheduling of the hearing.

MR. LEVINE: May we be more specific, and state the government will place this matter for hearing upon receipt of your..

SIO: I will not submit a written decision in the event that I deny the motion. That's what I'm trying to tell you.

MR. LEVINE : Well, then you can

SIO: Please, you are not in a position to advise me as to what to do.

MR. LEVINE: I am not attempting to, I am merely mentioning...

SIO: All I am telling you is that in the event I come to the conclusion that the motion should be denied, I will advise the proper authorities to schedule the hearing for further hearing.

MR. LEVINE: Thank you, that's agreeable to me.

MR. ALTOMARIANOS: May I state for the record if denied....

SIO: At the reopened hearing, if I should deny the motion I will make a statement on the record. If however I should grant the motion, I will enter a written order.

MR. LEVINE: Perfectly agreeable, of course, Mr.Mack.

SIO: If I grant the motion then I am terminating the proceedings.

All right, subject to the foregoing, the hearing is adjourned without date.

A 44

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

MATTER OF

STEFANOS ZAOUTIS

- Respondent-

FILE A 13 942 820 - New York

IN RESCISSION PROCEEDINGS

TRANSCRIPT OF HEARING

Before Special Inquiry Officer Joseph J. Mack

Hearing ~~held~~ continued on April 10, 1972 at 20 West Broadway, New York, N.Y.

Recorded by Dictabelt Transcribed by P. J. Killela

Official Interpreter Mr. Odise Dhima (USINS) Language Greek

IN BEHALF OF SERVICE:

Nathan Levine, Esq.,
Trial Attorney
New York, N. Y.
Station

IN BEHALF OF RESPONDENT:

Nicholas Altomarianos, Esq.,
1290 Avenue of the Americas
New York, N. Y.,

(of Counsel: Tachna, Bauman, Asarch, & Altomarianos, Esqs.)

I hereby certify that to the best of my knowledge and belief the following pages numbered -10 through -27 - are a complete and accurate transcript of the above-described hearing.

Signature
Special Inquiry Officer
Title
Apr. 17 1972
Date

Form I-297
(Rev. 3-25-65)

GPO 954-456

SIO TO RESPONDENT (through the official interpreter):

Q What is your true name?

A Stafanos Zacutis.

Q Do you still live at 3508 24th Avenue, Astoria, New York?

A Yes.

Q Do you speak and understand the English language?

A Yes.

Q Do you understand the Greek language spoken by the interpreter?

A Sure.

Q It is my considered opinion that it would be to your best interest to have the use of the Greek interpreter at this hearing for you?

A Sure.

Q Do you understand the Greek language spoken by the interpreter?

A Yes.

Q If you should not understand a question translated to you in Greek, say so and the question will be explained to you. If however you do answer I will assume that you have understood the question and what it means. Do you understand what I am saying?

A Yes, sir.

Q You are aware of the fact that you are under these proceedings to determine whether or not your permanent status in the United States should be rescinded.

A Yes.

Q Do you wish to be represented by Mr. Altomarianos, who is present?

A Yes, sure.

SIO: Are you ready to proceed, Counsel?

MR. ALTOMARIANOS: Yes, we are.

MR. LEVINE: The government is ready.

SIO TO RESPONDENT: (through the official interpreter):

Q Will you stand please and raise your right hand to be sworn. Do you solemnly swear that all the testimony you are about to give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

A I do.

Q Be seated.

SIO: Mr. Altomarianos, at the last hearing on June 2, 1971, you made a motion to dismiss on the ground that the five year limitation had expired. At that time I reserved my decision on the motion in light of the fact that there had been appeal pending in United States Court of Appeals for the ninth district in the matter of SINGH v. the Immigration Service, et al. I now deny your motion on the basis of this decision which has been handed down by the court in that case.

SIO: Mr. Levine, you may proceed.

MR. ALTOMARIANOS: But just before that I would like to preserve all of our rights to appeal that decision...

SIO: You may reserve your right and take an exception to my decision.

MR. ALTOMARIANOS: No, not an exception, I just want to preserve our rights due to the fact that we are willing to proceed in this case we reserve our right to appeal that particular decision.

SIO: Well, you cannot appeal that decision. You can appeal the decision in this case.

MR. ALTOMARIANOS: Your decision, all right.

SIO: Mr. Levine, you may proceed.

MR. LEVINE: Before I start the questioning, Mr. Mack, I have discussed this matter with Counsel for the respondent, andwe have stipulated as follows that the respondent admits allegations 1, 2, 3, 4, 5, - 9, and 10. Respondent denies allegations 6, 7, and 8. And likewise denies the conclusions based on the allegations contained in the notice.

MR. ALTOMARIANOS: Right, thank you.

MR. LEVINE TO RESPONDENT:

Q Mr. Zacutis, when did you first come to the United States?

A November the first, 1963.

Q And what was your status in the United States? At that time?

A I came as an employee of Greek Consulate of New York.

Q You were a doorman, is that right?

A Yes.

Q Now when did you leave that job as a doorman?

A When I got married.

Q As a matter of fact, you left the job some time before you got married, is that right?

A No.

Q Was it on the day you were married?

A No not the same day, after I found an apartment.

Q Mr. Zacutis, when did you make up your mind that you wanted to remain in the United States permanently?

MR. ALTOMARIANOS: Mr. Mack, before we go any further, I would like to make an objection that the respondent is being used as a witness by the government to make out its case, a prima facia case. I would like to reserve the right of the respondent to be his own witness in his own behalf, and not to

be used as the government's witness at this particular time.

SIO: I overrule your objection. The government has the right to call anybody as its witnesses.

BY RESPONDENT: When I found the girl in order to get married.

MR. LEVINE TO RESPONDENT:

Q Did you have any close relatives in the United States at that time?

A A brother, an American citizen for eight years.

Q And did you consult him about attempting to obtain lawful permanent residence in the United States?

A It was not necessary to get the advice of my brother because I found - I got acquainted with this girl.

SIO: Gentlemen, before we go any further, I think we should mark into the record as Exhibit, the notice of intention to rescind, as Exhibit # 1, and the answer of June 10, 1970, will be marked Exhibit # 2. I take it there is no objection?

MR. LEVINE: No, sir.

MR. ALTERMARIANOS: No objection.

SIO: All right, Mr. Levine, you may go ahead.

MR. LEVINE TO RESPONDENT:

Q That's not what I asked you, Mr. Zaoutis. I didn't ask you if it was necessary to talk to your brother. I asked you whether you did consult with your brother about this?

A No. I told him that I have decided to get married and he told me why not.

Q At that time did you have anybody in mind to marry, Mr. Zaoutis?

MR. ALTOMARIANOS: I object to the question that it doesn't state specifically in what particular time we are discussing....

SIO: I'll sustain the objection.

ORM 1-299
(9-28-65)

MR. LEVINE TO RESPONDENT:

Q When did you make up your mind that you wanted to remain in the United States permanently.

SIO TO RESPONDENT:

Q What date, approximately?

A When I found the girl.

Q When was this?

MR. LEVINE TO RESPONDENT:

Q What date was this?

A I don't remember.

SIO TO RESPONDENT:

Q You don't remember the Year, the month, the time of the year?

A I think it was in 1964.

MR. LEVINE TO RESPONDENT:

Q Do you have any idea, what month, it was in 1964?

A --

MR. LEVINE: May we go off the record, just a minute.

SIO: Now repeat the question.

MR. LEVINE TO RESPONDENT:

Q Do you have any idea what month it was in 1964 that you met this girl?

A I am not sure, because I think it was September or October. It was the time of the exposition of the show. The exposition took place in New York at that time.

Q Who is the girl?

A Fredeswinda Camacho.

Q And how did you find this girl, sir?

A I think I already testified about that, sir.

Q Well, you testify again.

A I knew her at the exposition, the show.

Q What exposition?

A The Fair, that they had at that time in Long Island, in Queens.

Q Mr. Zaoutis, are you telling me that there was an affair -- a Fair - in Long Island in 1964?

A Yes.

Q Where in Long Island?

A I took a train and I got off at the Fair.

Q And was she working at the fair, or how did you meet her?

A No, I met the girl there, we talked.

Q Can you talk English, sir?

A Not very well, but I speak the popular language.

Q What's the popular language?

A I didn't know - I did not attend high school, but I am speaking in English because I am working then.

Q Up to that time you were working at the Greek Consulate, right?

A Yes.

Q Does this lady, Miss Camacho speak Greek?

A No.

Q What language did she speak?

A English. Her language is Spanish, but she speaks also, English.

Q And you picked her up at the fair as you say?

A Yes.

Q How loften did you see her, after that?

ORM I-299
(9-28-65)

A A few times.

Q How many times?

A I don't remember exactly how many times.

Q When were you married?

A After a certain time I told her that I wished to get married with her, to her, and she said, why not, I accept.

Q When did you get married, sir?

A You have the certificates in the file, I don't remember the exact date?

Q When did you marry her, sir, what's the date?

MR. ALTOMARIANOS: I think the respondent responded that he did not remember the exact date.

SIO: Then let him give his best recollection.

BY RESPONDENT: I told you I don't remember the date. I remember the year.

MR. LEVINE TO RESPONDENT:

Q What year was it?

A There's so many years, I can't remember it. In 1964, I think.

Q How many days or weeks after you first met her did you marry her?

A I don't remember.

Q How often did you see her before you married her?

A I don't remember exactly.

SIO TO RESPONDENT:

Q Do you remember whether it was one time or ten times ?

A I told you, I don't remember.

MR. LEVINE TO RESPONDENT:

Q All right, Mr. Zacutis, where were you living at that time, as you remember it to be in September or October of 1964?

A At the Greek Consulate.

Q Where were you living, where were you sleeping?

A At the Consulate.

Q All right, how long did you continue to live at the Consulate?
MR. ALTOMARIANOS: I think the question is incomplete, until or before what?
SIO TO RESPONDENT:

Q Until what date did you live at the Consulate?

A Until I got married, and then I left the Consulate.

Q On the day you were married you left the Consulate?
A No.
Q When?

A I told you I don't remember the exact date, but I remained there because I was not able to find a job.

Q How long did you remain there?

A I was there from my arrival in November until August, or September 65, when I obtained my permanent residence card.

MR. ALTOMARIANOS: I don't know whether you are discussing his job or where he was living. I don't know whether the respondent is clear on that.

MR. LEVINE: I will clarify that, Counsellor.

SIO: From what I understand at this stage is that he remained at the Consulate, as he testified from November until next September when he got his job, when he got his card for permanent residence.

MR. LEVINE: I will clarify it.

MR. LEVINE TO RESPONDENT:

Q Do you mean you continued to work at that job until you got your permanent residence, Mr. Z.outis?

A Yes.

Q And did you continue to sleep there, sir, until you got your permanent residence?

A No.

Q Well, where did you sleep, sir?

A At the address I have given. In Brooklyn.

Q What address in Brooklyn?

A 226 Central Avenue, Brooklyn.

Q And how long did you live at 226 Central Avenue address in Brooklyn, sir?

A I don't remember exactly, but I think I remained there about thirteen months or fourteen months, about.

Q Mr. Zacutis, did you take Miss Camacho out a number of times before you were married to her?

A Yes.

Q And then did you take her home after that?

A No, because she was living with her sister at that time.

Q Well, at least did you take her to the door of where she lived with her sister?

A No, I was going for my job and she left.

Q Do you mean you want me to understand that you took a young lady out a number of times, Mr. Zacutis, and then you left her whereever it was and you went home and she went home, separately?

MR. ALTOMARIANOS: I object to that because the respondent did not testify that he went home. He said he went to work when he left her.

MR . LEVINE TO RESPONDENT:

Q All right, to the place where you worked and lived?

A She didn't tell me to accompany her to her home and I knew only her sister.

Q Well where did she live, do you know?

SIO: Do you mean her sister, or her?

MR. LEVINE: No, I mean where Miss Camachó lived, prior to the time you married her.

BY RESPONDENT: She didn't give me any address, sir. She just told me that she was living with her sister at B ronx, and she was calling him by telephone.

MR. LEVINE TO RESPONDENT:

Q Do you mean she was calling you by telephone?

A Yes.

Q Where did she call you, sir?

A At the Greek Consulate where I was working.

Q Mr. Zacutis, when did you move to 226 Central AVenue in Brooklyn, do you know?

A I don't remember the exact date. After I got married, I found two days later this apartment?

A Did you move in?

A After two or three days I entered this apartment.

Q Mr. Zacutis, didn't you tell me before that you didn't move out of the Greek Consulate building until you obtained your green card, or permanent residence status?

A When I found a job I asked the American Consulate, I was not living there any more.

Q And that job was about the time that you got the green card for lawful permanent residence, is that right?

A What new job are you talking about?

Q How long did you owrk as a doorman at the Greek Consulate?

A I told you, until I get the card.

Q And did you sleep at the Greek Consulate while you were working there?

MR. ALTOMARIANOS: Objection, as to the question, are you asking about before or after the marriage?

MR. LEVINE: I am not referring to marriage, sir.

MR. ALTOMARIANOS: When he worked there, did he live there?

MR. LEVINE: That's right.

MR. ALTOMARIANOS: You are assuming that he had lived there.

SIO: Mr. Altomarianos, there is an inconsistency...

MR. ALTOMARIANOS: That's the reason I raised my objection earlier. I thought my client was confused by the questioning was work, and then it went to sleeping, and I do not think he understood it.

SIO: The question before him is: During the period of time you were working at the Greek Consulate did you sleep at the Greek Consulate.

MR. ALTOMARIANOS: And I think the respondent testified clearly that he did.

SIO: I don't know how sure, and I want to make sure.

MR. ALTOMARIANOS: I think he would be more sure if the dates were stated.

SIO: Now, please, I will not enter into any argument with you. The question is - during the period of time that he was working at the Greek Consulate, did he live at the Greek Consul and no place else?

BY RESPONDENT: Yes, I was sleeping there, until I got married.

MR. LEVINE: TO RESPONDENT:

Q Until you got married, or until you got your green card, which is it, Mr. Zacutis?

A Until I got married.

SIO: Now, wait one minute, please. Just so there will be no confusion here.

SIO TO RESPONDENT:

Q When did you get married?

MR. ALTOMARIANOS: I think the record can speak for itself.

SIO: I just want to have this clarified. Iam not goingto be for days and days on end without the possibility of clarifying something.

SIO TO RESPONDENT:

Q When did you get married?

A I told you before that I don't remember exactly, but I think it was January or February 1964.

Q 1964 or 1965?

A I don't remember the exact date, of the marriage.

Q Your attorney has admitted that you were married on January 10, 1965. Does that refresh your recollection?

A If the lawyer says so, it means he found out by the documents that I got married at that time.

Q And your lawyer states that you got your permanent residence on or about August 25, 1965. Does that refresh your recollection as to when approximately you got the green card?

A I think so, that's the date I obtained my card.

Q Now to the best of my recollection and my trial notes, is that you did not move out of the Greek Consulate until you got your green card. Is that correct?

A I told you that I would not go out without having assured of return.

MR. ALTOMARIANOS: Can we go off the record here a minute?

SIO: No, I would just like to clarify this...

MR. ALTOMARIANOS: He is still confusing work and...

SIO: Please, you are doing more confusing than anything else, Counsel.

RM 1-29
9-28-65

SIO TO RESPONDENT:

Q Now, listen to me, please. You said that you did not move out of the Greek Consulate until you got your green card, your permanent residence in the United States. Was that statement correct?

A What do you mean? If I left the Consulate, I would like to say that if I was continuing to work or to leave there?

Q Until when did you work at the Greek Consul?

A I told you until 1965.

Q Did you work there until you received your green card?

A Yes.

Q And did you live at the Greek Consulate until you got the green card?

A I told you that I was not sleeping there, after I got married.

SIO: Go ahead.

MR. LEVINE TO RESPONDENT:

Q Did anybody introduce you to Miss Macho - Miss Fredeswinda Camacho?

A What do you mean by asking me that?

Q Well, did youhave a mutual friend, who introduced you?

A I told you that I was acquainted to her directly without any intermediary person.

Q That's what I want to make sure of sir. That nobody else introduced you to her.

A No.

Q Do you mean that my statement is correct or is incorrect? Which? I want to make certain that I understand you? Did any body introduce you to her or her to you?

A I don't remember.

Q You married this lady and you want me to understand that you don't remember whether you were introduced to each other, or you picked her up completely on your own?

MR. ALTOMARIANOS: May I have a five minute recess to discuss with my client the case, in the interests of justice.

SIO: I don't get what you mean, inthe interests of justice?

MR. ALTOMARIANOS: I want a five minute recess to discuss with my client the questioning that is going on.

SIO: What is the basis of this request in the interest of justice?

MR. ALTOMARIANOS: I feel that I would like to discuss with my client the questioning that is going on, the cooperation or help inthe continuation of the case.

SIO: You can ask him to be cooperative...

MR. ALTOMARIANOS: I want to talk to him.

MR. LEVINE: I would object to that..

SIO: I can't see the legal basis fo your request, Counsel.

MR. ALTOMARIANOS: Are you saying that he has no right to discuss with his Counsel in private the questioning that is going on, so I can advise him.

SIO: Not in the midst of an examination.

MR. ALTOMARIANOS: You are saying that he has no right, then?

SIO: Now, don't argue with me...

MR. ALTOMARIANOS: I am asking you, his right?

SIO: I am making a rule, that while he is being questioned on the stand there is no basis in law or any rule of evidence that I know of for a man to be withdrawn from the stand and a recess taken so that he may confer with his attorney as to what and how to testify.

RM 1-299
-28-65)

MR. ALTOMARIANOS: I take exception to that.

SIO: If you wish to direct a question to him to tell the truth, I will permit you to do that.

MR. ALTOMARIANOS : I request a five minute recess to discuss with him this line of questioning.

SIO: I will deny your request.

SIO: Go ahead, Mr. Levine.

MR. LEVINE TO RESPONDENT:

Q Is that what you want me to believe, Mr. Zauotis?

A What?

Q That you don't remember whether you were introduced to her, or whether you picked her up on your own.

A I don't remember.

Q And do you now recall exactly how many times you saw her between the times you first met her and the time you married her?

A No.

Q Mr. Zaoutis, did you pay anybody any money for this marriage to Miss Camacho?

A I don't understand that question.

Q Did you pay anybody any money for the arrangement of the marriage to Miss Camacho?

A No.

Q Do you know anybody by the name of Angelo Palazzo? Colazzo? (spelled)?

A What?

SIO TO RESPONDENT:

Q Do you know anyone by the name of Angelo Collazzo?

A I think he is a cousin of her's.

MR. LEVINE TO RESPONDENT:

Q Do you mean of this Comanho woman?

A So he tells me.

Q And do you know anybody by the name of James Caperonis?

A James Caperonis? I don't remember.

Q Do you know any body by the name of Luis Rivera?

A No.

Q Did you have witnesses to your marriage sir?

A What do you mean with this, to sign the paper?

Q Yes.

A When we went to the City Hall her cousin accompanied us and in his car.

Q And who signed the papers?

A He called to persons there to sing the papers. I don't know who they were.

Q So you don't know who the witnesses are to your wedding?

A We did, we had his cousin and some other people I don't remember who. I don't remember their names.

Q You didn't know them? You didn't know these people before?

A No, only my cousin, the wife's cousin, the cousin of my wife.

Q And what was the cousin's name?

A Angelo.

Q Angelo what?

A You told me before his last name.

Q Camacho?

A Yes.

Q Did he witness the service?

A They did.

Q And her cousin was a witness to your wedding, Mr.Angelo Collazzo?

A I don't know, he knew better how to speak English he accompanied us in his car.

Q Could you tell me whether he was a witness to your wedding Mr. Zacutis?

A I remember he accompanied us to City Hall, but I don't remember if he, himself, signed the papers.

Q All right, And your then wife's name was Fredeswinda Camacho, is that right?

A Yes.

MR. LEVINE: Mr. Mack, I have no further questions of this witness at this time.

SIO: Mr. Altomarianos, do you wish to proceed.

MR. ALTOMARIANOS: I would wish to reserve our right to cross examine sir.

SIO: You may proceed now.

MR. ALTOMARIANOS: No, I would like to preserve our right to examine.

SIO: Then examine, I am giving you the opportunity now. At this time if you wish. If you don't want to take advantage of it, then..

MR. ALTOMARIANOS: Off the record.

SIO: I will give you five minutes then off the record.

SIO: Hearing is resumed.

SIO: Mr. Levine, do you have any other witness to present now ?

MR. LEVINE: Not at this time, sir.

MR. ALTOMARIANOS: I would like to preserve my right to present the respondent's entire case sir, the next time we appear, rather than go into a piecemeal program.

SIO: I will give you the opportunity...

MR. ALTOMARIANOS: No, I am just stating for the record, it;s more than a request. I would like the government to understand that I would like to present an entire case of the respondent from beginning to end, o.k.?

SIO: You will not be prevented from presenting every bit of evidence that is admissible. Do you ...

SIO: Mr. Levine, do you wish to have an adjournment to present witnesses?

MR. LEVINE: Yes, Mr. Mack, I have witness coming in from quite a good deal of distance away. I have a new date, June 22nd, 1972 at 8:45.

SIO: All right, the hearing will be adjourned until June 22, 1972 at 8:45 and the respondent will appear here without further notice.

SIO TO RESPONDENT:

Q Do you understand sir, the hearing inyour case is adjourned until June 22nd at 8:45 a.m.. You will appear here without further notice. Do you understand?

A Yes.

SIO: Hearing is adjourned.

A 63

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

MATTER OF

FILE A 13 942 830 - New York

Stefanos ZACUTIS,
-Respondent-

IN Deportation PROCEEDINGS

TRANSCRIPT OF HEARING

Before Special Inquiry Officer Joseph J. Mack

Hearing held on continued October 2, 1972 at 20 West Broadway, New York, N. Y.

Recorded by Dictabelt Transcribed by P. J. Killela

Official Interpreter Mr. Anthony Alvarenga (USINS) Language Italian (for 2d witness)

IN BEHALF OF SERVICE:

Nathan Levine, Esq.,
Trial Attorney

New York, N. Y.
Station

IN BEHALF OF RESPONDENT:

(none present)

- 28-

I hereby certify that to the best of my knowledge and belief the following pages numbered _____ through -39- are a complete and accurate transcript of the above-described hearing.

Signature
Special Inquiry Officer
Title
OCT 2 1972
Date

Form I-297
(Rev. 3-25-65)

GPO 964-456

SIO: Mr. Levine, I understand you have a statement you wish to make for the record.

MR. LEVINE: Yes, I do, sir. I have just talked with Mr. Altamorianos, attorney for the respondent in this matter. He told me that although he was in the office, that is, the immigration office, this morning, he suddenly was taken quite ill and he is on his way to the doctor, or he had been to the doctor, and was on his way home. He advised me that he is grateful to both you and myself for our prior considerations in this matter. He understands that we have witnesses who have come from a long distance today and he stated unequivocally on the phone to me, that he had no objection to the taking of the testimony of these witnesses in his absence. He waives any cross-examination of these witnesses and will sign any paper to that end, if that be necessary and advisable when he next appears before us.

SIO TO RESPONDENT (through the interpreter):

Q Do you understand all that was just said?

A Yes.

Q I will have Mrs. Tsopanakos, our official Greek interpreter, keep you aware of everything that is going on here and everything that is presented, in order that you may know what is going on, do you understand?

A All right.

SIO: Mr. Levine, will you present your witness.

MR. LEVINE TO WITNESS: Mr. Callazo.

SIO TO WITNESS:

Q What is your name?

A Angel Louis Collazo. (last name spelled by witness).

Q And your address is?

MR. LEVINE: Mr. Mack, if I may, on...

MR. LEVINE: Mr. Mack, if I may, on behalf of the witness,

SIO: Let me ask him this first.

SIO TO RESPONDENT _ WITNESS:

Q Do you speak and understand the English language?

A Yes, I do.

Q If at any time you cannot understand a question please stop and have it explained to you. Now will you stand up and raise your right hand. Do you solemnly swear that all the testimony you are about to give here will be the truth, the whole truth, and nothing but the truth, so help you God?

A I do.

Q You may sit down now.

SIO: You may proceed, Mr. Levine.

MR. LEVINE TO THE WITNESS:

Q Mr. Callazo, the end of 1964 or the beginning of 1965, were you connected with an attorney's office?

A Yes, I was.

Q Please speak more loudly.

A Yes, I was.

Q And what was your function with that attorney?

A I used to be the Counseller on marriages.

Q Counsel on marriages?

A Various persons come in and I would take care of immigration papers.

Q Do I understand you correctly that you found American citizen girls to marry aliens so that they could adjust in the United States, is that it?

A Yes, that's right.

Q And do you happen to know how, or who obtained the aliens?

A Yes, I know.

Q Who?

A Well I only know him by his name - first name was JIMMY.

Q And when he brought - this Jimmy - brought an alien who was illegally in the United States, or who wanted to become a permanent resident, to this office you were designated to find a young lady who was a United States citizen so that he could marry?

A That is correct.

Q Did you - do you recall Mr. Collazo, whether you obtained a young lady by the name of FREDESWINDA CAMACHO in the early part of 1965 to marry an alien?

A I don't remember exactly the time when it was but I can remember Fredeswinda Camacho.

Q Who was she supposed to marry, do you know?

A Well at the time I didn't know him.

Q Did you subsequently find out?

A Yes, I met him the first time when we went to New York to get the papers for the license, the marriage license.

Q And is that the gentleman seated across the table, Mr. Stefanos ZACUTIS?

A Yes, he is.

Q Now, when you were asked to find a United States citizen girl, was anything told to you with regard to the arrangements for the marriage?

A Yes.

Q What were they?

A The arrangements were I was to get the girl, they were to get married, they were not to live together within a year they get a quick divorce, in South America.

RM I-299
-28-65)

Q Do you happen to know how much this young lady was supposed to get paid for this?

A It was between three and four hundred dollars I think, I don't know exactly the amount of money.

Q And when did you speak to the young lady with regard to this proposition? If you recall?

A When did I speak to her?

Q Yes.

SIO TO WITNESS:

Q Using the date of the marriage as a base, how long before this was it?

A It wasn't long before.

MR. LEVINE TO WITNESS:

Q Well, how long, a week?

A I would say one or two weeks. It could go either way.

Q And did the young lady agree?

A Yes, she did.

Q Did you tell her what the arrangements was, that is, that she would be paid, that they were not to live together and so on?

A Yes.

Q And did she agree?

A Yes.

Q Did you arrange for the young lady to meet Mr. Zaoutis?

A Yes, I did.

Q When and how?

A Well, I do know that I was to meet him with her and the other party, somewherein Mahhattan, if I tell youthe exact place I will be lying because I don't well remember.

Q Was it at a time when they applied for a license to marry?
That was
A /The first time but I don't remember where it was. It could have been in Queens or Manhattan, but I don't remember the place.
Q And that was the first time the two of them met as far as you know?
A As far as I can remember, yes.
Q Jimmy introduced this young man to you and you introduced the young lady to Mr. Zacutis, is that correct?
A Yes.
Q Did you obtain a license for the two of them to marry?
A Yes, I did.
Q And did you attend the marriage?
A Yes, I did.
Q Could you tell us what happened x immediately after the two were married, Mr. Stafanos Zacutis and Fredeswinda Comacho?
A First they have to start looking for an apartment which I did found myself, it was somewhere in Center Street, Brooklyn.
Q Central Avenbue?
A Central Avenue, I don't remember the number. I found the apartment myself and she was to move in that apartment with her sister. And he was to bring some clothes from his home and leave them there, in case anybody goes and checks.
Q But before that Mr. Collazo, isn't it a fact that right from the wedding you went to the attorney's office?
A Oh, yes.
Q All of you?
A All of us, yes.

RM 1-299
-28-65)

Q Jimmy, you, Mr. Zacutis, and Fredeswinda Comacho?
A Yes.
Q And did the young lady sign any papers at that office?
A She signed a couple of papers, yes sir.
Q And then you left that office and what happened?
A Well, when we were at the office, I think they left in Jimmy's car, and I went in my own car with her. She used to live then I'm pretty sure on DeKalb Avenue. I gave her some money there and then at night she moved over.
Q Excuse me, you say you gave her some money?
A Yes.
Q Was that the payment that you were supposed to make to her because of the marriage?
A Yes.
Q Did you pay her the full amount?
A Yes, I did.
Q And thereafter was it part of the agreement for them to obtain an apartment?
A Yes, it was.
Q And who was supposed to live in the partment if you recall?
A Well supposedly they were supposed to be living there together but they weren't, only her sister and her were living at the apartment at the time.
Q And do you know when the clothes of Mr. Zacutis were brought over to the apartment?
A What kind of clothes?
A His clothes, when?
A Right immediately after they took the apartment.

Q Did you visit Fredeswinda and her sister at the apartment on Central Avenue after the marriage?

A Day after.

Q And could you tell me whether in fact Mr. Zacutis lived there?

A She only was living there.

Q And this was all in accordance with the agreement that was entered into?

That's right.

MR. LEVINE: I have no further questions of the witness.

SIO TO RESPONDENT:

Q Do you have anything you want to ask this witness?

A No.

MR. LEVINE: Thank you, Mr. Calazzo, you can sit over there, if you want.

SIO TO FEMALE WITNESS: (through Spanish interpreter):

Q Young lady what is your name?

A Fatima Comacho --no, it is FREDESWINDA - spelled FREDSUINA.

MR. LEVINE: FREDESWINDA?

BY WITNESS: Yes.

SIO TO WITNESWINDA. Your last name is what?

BY WITNESS: Comacho.

SIO TO WITNESS:

Q Do you understand the Spanish language spoken by the interpreter?

A Yes.

Q Now, if you should not understand a question, say so, and I will have it explained to you. Do you understand me?

A Yes.

Q Do you solemnly swear all the testimony you will give in this proceeding

M 1-299
28-65)

will be the truth, the whole truth, and nothing but the truth, so help you God?

A I do.

Q You may be seated.

MR. LEVINE TO WITNESS:

Q When were you married for the first time, Fredeswinda?

A When I married?

Q Yes.

A When I was married to Steve.

Q When was that?

A January 10. in 1985.

Q And how did you come to marry Steve?

A Because Angelo talked to me about a marriage for money.

Q When did he talk to you in relation to the marriage?

A I don't remember exactly the date.

Q Well, was it a week, two weeks?

A About a week before.

Q And what did Angelo tell you?

A Angelo told me that I was to marry a fellow, a young fellow, for money, that he was a Greek, in order for him to stay.

Q And was anything told to you about whether or not you are going to live with the man?

A Yes, of course.

Q What was told to you?

A That he would pay for half the rent and I would pay for the other half but that he would not live in my home, myapartment.

Q And how long was this marriage supposed to last?

A A year.

Q What was going to happen at the end of the year?

A We would get the divorce.

Q Did you agree with this proposition?

A Yes.

Q And when is the first time - I will withdraw that. Is this the gentleman that you married, Mr. Zacutis, the gentleman sitting across the table?

AYes.

Q When is the first time you saw Mr. Zacutis?

A The day we got married.

Q Where did you see him?

A In Queens.

Q At the marriage license bureau?

A Yes.

Q Did you obtain the license?

A They didn't want to give it to me because I didn't have any identification.

Q So what did you do?

A We came here to Manhattan.

Q Did you get the license there?

A Yes.

Q Did you get married?

A Yes, that same day.

Q Where?

A At a church in Queens.

Q What did you do after the marriage ceremony?

A I went in the car with him to the lawyer's office.

Q What did you do at the lawyer's office?

A I signed a few papers.

Q For what reason?

A Well, in case they wanted to deport him it would prove that I am married to him.

Q What happened after that?

A Then he took me home and a week after we obtained the apartment.

Q Who took you home?

A Angelo.

Q Mr. Calazzo?

A Yes.

Q Did you go home with Mr. Zacutis?

A No.

Q Did you get paid what you were supposed to get paid?

A Yes.

Q How much money did you received?

A Three fifty, I don't remember, about.

Q Where were you living at that time?

A DeKalb Avenue.

Q Brooklyn?

A In Brooklyn, yes.

Q And when did you get your apartment?

A About a week or two after we were married.

Q Who got the apartment?

A Angelo.

Q Did you move into that apartment? Excuse me, where was the apartment?

A 226 Central Avenue.

Q Brooklyn?

A In Brooklyn, yes.

Q Did you move into that apartment?

A Yes.

Q Who did you live there with?

A With my sister.

Q Did she live with you all the time you lived in that apartment?

A Not until the last day.

Q Did Mr. Zacutis ever live in that apartment?

A No.

Q Does Mr. Zacutis ever sleep in that apartment?

A Yes.

Q When?

A A night.

Q How many nights?

A One.

Q When was that?

A I don't remember.

Q Well, how long after you got the apartment, or how long after the marriage?

A About three months after, something like that.

Q Could you tell me why he slept in the apartment that night?

A I don't know, I believe he had some problems with immigration, he had to show.

Q How big was the apartment?

A Four rooms.

Q How many bedrooms?

A One.

Q When he slept at the apartment, where did he sleep?

A In the bedroom.

Q q Where did you sleep?

A In the living room.

Q Where did your sister sleepZ

A In the living room.

Q Did you ever at any time at any place ever have sexual relations with Mr. Zacutis?

A No.

MR. LEVINE: No further questions.

SIO TO WITNESS:

Q Did you understand everything that was asked of you?

A Yes.

SIO: Mr. Levine, I think you should get a date for further hearing in this matter.

MR. LEVINE: Yes, sir, I'll be glad to get a new date.

SIO TO RESPONDENT:

Q Mr. Zacutis, I am adjourning your case until December 7, 1972 at 8:45 a.m. Please advise your attorney, Mr. Altomarianos of the date on which you must appear.

A Yes, sir.

SIO: Hearing adjourned.

RM 1-299
-28-65)

A 76

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

MATTER OF

FILE A 13 942 820 - N. Y.

STAFANOS ZACUTIS

-Respondent-

IN Deportation PROCEEDINGS

TRANSCRIPT OF HEARING

Before Special Inquiry Officer Joseph J. Mack

Hearing ~~held~~ continued on February 7, 1973 at 20 West Broadway, New York, N. Y.

Recorded by Dictabelt Transcribed by P. J.Killela

Official Interpreter Mr. Emanuel Scaros (USINS) Language Greek

IN BEHALF OF SERVICE:

Nathan Levine, Esq.,
Trial Attorney
New York, N. Y.
Station

IN BEHALF OF Respondent:

Nicholas Altomarianos, Esq.,
1290 Ave. of the Americas
New York, N. Y.

(of Counsel: Tachna, Bauman, Asarch, & Altomarianos Esqs.)

I hereby certify that to the best of my knowledge and belief the following pages numbered -40- through -41- are a complete and accurate transcript of the above-described hearing.

Signature
Immigration Judge
Title
SEP 13 1973
Date

Form I-297
(Rev. 3-25-65)

GPO 954-456

SIO TO RESPONDENT (through official interpreter):

Q What is your name?

A Stafanos Zacutis.

Q Where do you live at the present time?

A 35-08 24th Avenue, Astoria.

Q Do you speak and understand the English language?

A Yes.

Q Do you understand the Greek language as spoken by the interpreter?

A Yes.

Q If you should at any time not understand any question translated to you in Greek, say so and that question will be made fully clear to you, do you understand?

A Yes.

Q Are you aware of the fact that you are still under oath in this proceeding?

A No.

Q Weren't you sworn on previous occasions when you were before me?

A Yes, yes.

Q Do you wish to be represented by Mr. Altomarianos who is present?

A Certainly.

SIO: Counsel, are you ready to proceed?

MR. ALTAMARIANOS: Yes, sir.

SIO: Mr. Levine?

MRL LEVINE: Yes, sir.

SIO: Counsel, I believe you were served with a copy of the testimony given on October 2, 1972?

MR. ALTAMARIANOS: Yes, sir.

RM I-299
-28-65)

SIO: Do you have any additional evidence you wish to present?

MR. ALTAMARIANOS: We have nothing further to present, Mr. Mack.

SIO: Mr. Levine, have you anything further to present?

MR. LEVINE: No, sir.

SIO: Yes, Mr. Altamarianos.

MR. ALTAMARIANOS: I just want to say that though this matter has been on for more than nine years.....

SIO: I am sorry but he cannot apply in this proceeding for an adjustment of status through suspension of deportation that is. In due course I will make my decision and serve upon respondent's counsel and the Trial Attorney a copy. This hearing is closed.

ORM I-299
9-28-65)

A 79

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

OCT 15 1973

File No.: A13 942 820 - New York

In the Matter of:)

Stefanos Zaoutis) In Rescission Proceedings

- Respondent -)

In Behalf of Respondent:

Nicholas Altomerianos, Esq.
1290 Avenue of the Americas
New York, N.Y. 10019

In Behalf of Service:

Nathan Levine, Esq.
Trial Attorney
New York, N.Y. 10007

DECISION OF THE IMMIGRATION JUDGE

The proceeding was instituted on May 20, 1970. The answer was served on June 10, 1970. Counsel for the respondent requested a hearing either before June 29, 1970 or at sometime following July 27, 1970. The initial hearing was commenced on June 2, 1971.

Counsel for the respondent at the opening of the hearing on June 2, 1971 moved for a termination of the proceeding on the ground that more than five years elapsed from the granting of permanent resident status on August 25, 1965 and the date of any entry of any decision in connection with the rescission proceeding and thus the action in this case was barred by the statute of limitation provision in Section 246(a) of the Immigration and Nationality Act (8 USC 1256(a)). The Service submitted that the provision of Section 246(a) of the Act was tolled when the respondent was served with a "notice of intention to rescind under Section 246 of the Immigration and Nationality Act"

EXHIBIT D

on May 20, 1970 within the five year period, although the hearing attendant upon said notice had not commenced or had not been completed within the five year period. Decision on this motion was reserved pending decision by the United States Court of Appeals, Ninth Circuit in the case of Jiwan Singh vs Immigration and Naturalization Service et al which involved the interpretation of the statute of limitation provisions in Section 246 of the Act. The decision in the aforementioned matter (C.A. Cal 1972, 456 F. 2nd 1092) unequivocally sustains the Service position that service of the notice to rescind the adjustment within five years of the adjustment of status tolls the statute of limitations. (Certification to the United States Supreme Court was denied 10/10/72, 71-1569). The motion for a termination of the proceedings is denied.

It has been conceded that the respondent is not a citizen or national of the United States, that he is a native and citizen of Greece, that he entered the United States at New York, New York on November 6, 1973, that he was then admitted as a nonimmigrant employee of a foreign government, that on January 10, 1965 he went through a marriage in New York, New York with Fredeswinda Camacho who later, filed a petition to accord him nonquota status as the spouse of a United States citizen which was approved May 14, 1965 and that on the basis of such approved petition, his application for status as a permanent resident was granted on August 25, 1965.

In issue are the allegations that respondent entered into such marriage with Fredeswinda Camacho solely for the purpose of obtaining nonquota status under the Immigration laws, that he did not intend to enter into a bona fide marital relationship with Fredeswinda Camacho and that he never resided with Fredeswinda Camacho as husband and wife and that he never had sexual relations with Fredeswinda Camacho.

The evidence of record consists of the testimony of the respondent, Angel Collazo and Fredeswinda Camacho.

The respondent arrived in the United States on November 1, 1963 and was admitted as an employee of the Greek Consulate in New York, New York. He testified that he was employed as a doorman and lived at the Greek Consulate. He stated that he decided to remain in the United States when he found a girl to marry. He said that he met Fredeswinda on his own without introduction at the World's Fair in Long Island in 1964. He asserted that she was a "pick up." He had no recollection as to how many times he saw her before the marriage. He could not recall the date of the marriage. He averred that she lived in the Bronx and that he never visited her home. He said that their meetings before the marriage resulted from her telephone calls to him at the Greek Consulate. He said he entertained her but never escorted her home. While testifying that he lived with Fredeswinda at 226 Central Avenue, Brooklyn, New York for thirteen or fourteen months after the marriage on January 10, 1965 he admitted that he lived at the Greek Consulate

from date of entry into the United States in November 1963 until August or September 1965 when he obtained his permanent resident card. He stated that no payment was made for the arrangement of the marriage.

The testimony of Angel Luis Collazo and Fredeswinda Camacho was taken on October 2, 1972 in the presence of the respondent upon the stipulation by the attorney for the respondent whereby he waived his appearance and cross examination of the witnesses; nevertheless the testimony of the witnesses was translated to the respondent question and answer respectively by a Greek language interpreter. The respondent was offered at that time an opportunity, after he responded that he understood their testimony, to make any comment he desired and stated that he had no comment to make. The attorney for the respondent was prior to the hearing on February 7, 1973 supplied with a copy of the testimony taken on October 2, 1972.

Angel Luis Collazo testified that from the end of 1964 until the beginning of 1965 he was connected with an attorney's office as a counsellor on marriages. His duty was to find American citizen girls to marry aliens so that they could adjust their immigrant status in the United States. The illegal aliens were brought to the office by a man known to him only as Jimmy and that witnesses duty was to find a young lady who is a United States citizen so the alien could get married. He recalls that one or two weeks before the marriage he spoke to Frodewsinda Camacho. The arrangement was that she would marry an alien but would not be required to live with him and that within a year there could be a quick divorce

in a South American Country. For this service she was to get between $300 and 400 and one half of her monthly rental payments. He stated that he arranged for her to meet Stefanos Zaoutis at the license bureau somewhere in Manhattan, New York, New York. He stated that the initial meeting could have been in Queens, New York. As far as he can recall he stated that this was the first meeting of Fredeswinda Camacho and Stefanos Zaoutis. Jimmy introduced Zaoutis to him and he introduced the girl to Zaoutis. He said that he attended the marriage. He asserted that after the marriage they went to the lawyer's office where she signed several papers. Stefanos Zaoutis left in Jimmy's automobile and Fredeswinda Camacho left in his automobile. He stated that he paid her in full.

Part of the plan was to obtain an apartment to give color to the marriage. Shortly after the wedding Angel Luis Collazo located an apartment for Fredeswinda at 223 Central Avenue, Brooklyn, New York. She moved there with her sister. He stated that shortly thereafter Stefanos Zaoutis brought some clothes from his home and left it there in case anyone checked. He stated that only her sister lived there with Fredeswinda.

Fredeswinda Camacho testified that Angel Collazo spoke to her about a marriage for money about a week before the marriage on January 10, 1965. He said she would marry a Greek in order that he may stay in the United States. He told her she would get

BEST COPY AVAILABLE

$350 and one half of her rent for a year, then they would be divorced She stated that she met Stefanos Zaoutis on the day of the marriage at the marriage license bureau in Queens, New York. They were refused a marriage license so they went to Manhattan to get the license. She said they were married in a church in Queens then proceeded to the lawyer's office where she signed some papers. She stated that then Angel took her home and paid her the $350. She asserted that at that time she lived on DeKalb Avenue in Brooklyn, New York. She testified that about a week or two later Angel obtained an apartment for her at 228 Central Avenue, Brooklyn and she and her sister moved in to the apartment. She stated that about three months later Stefanos Zaoutis slept one night in the apartment because he was having some problem with the Immigration Service and he had to show he lived there. She stated on this occasion he slept in the bedroom and she and her sister slept in the livingroom. She asserted that she never had sexual relations with Zaoutis.

The testimony of Angel Luis Collazo and Fredeswinda Camacho appear to be totally credible. The testimony of the respondent appears to be totally incredible.

Based on the foregoing it is concluded that the Service has established by clear, convincing and unequivocal evidence of record that the respondent was ineligible for adjustment of immigrant status on August 25, 1965 on the ground that his marriage on January 10, 1965 to Fredeswinda Camacho was a sham marriage entered

into with no intent to be a valid and subsisting marriage and was entered into solely for the purpose of enabling the respondent to adjust his immigrant status in the United States and circumvent the immigration laws of the United States.

ORDER: IT IS ORDERED that pursuant to Section 246 of the Immigration and Nationality Act, the adjustment of status granted to the respondent on August 25, 1965, be rescinded.

JOSEPH J. MACK
Immigration Judge

A 86

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals
Washington, D. C. 20530

MAY 2 - 1974

File: A13 942 820 - New York

In re: STEFANOS ZAOUTIS

IN RESCISSION PROCEEDINGS UNDER SECTION 246
OF THE IMMIGRATION AND NATIONALITY ACT

APPEAL

ON BEHALF OF RESPONDENT: Nicholas Altomerianos, Esq.
1290 Avenue of the Americas
New York, New York 10019

ON BEHALF OF I&N SERVICE: Irving A. Appleman, Esq.
Appellate Trial Attorney

ORAL ARGUMENT: January 21, 1974

APPLICATION: Termination of proceedings

This is an appeal from an order of an immigration judge rescinding the respondent's permanent resident status previously granted under section 245 of the Immigration and Nationality Act. The appeal will be dismissed.

The facts are not in substantial dispute. The respondent is an alien, a native and citizen of Greece, who was admitted to the United States on November 6, 1963 as a nonimmigrant visitor. On January 10, 1965 he went through a marriage ceremony with a United States citizen, Fredeswinda Camacho, on whose visa petition he was later accorded non-quota status as the spouse of a United States citizen. On August 25, 1965, he was granted permanent resident status under section 245 of the Act. On May 20, 1970, the District Director issued a notice of intention under section 246 of the Act to rescind the adjustment of status on the ground that respondent was not in fact eligible therefor because his marriage was a sham

EXHIBIT E

and insufficient to entitle him to nonquota status. Respondent was served and on June 10, 1970, through counsel, requested a hearing before an immigration judge. At the opening of the hearing, which started on June 2, 1971, counsel moved to terminate the proceedings on the ground that rescission was barred by the five-year limitation of section 246. The immigration judge denied the motion, the hearing proceeded, and on October 15, 1973 the immigration judge entered the order before us on appeal, concluding that the Service had established its charge by clear, convincing and unequivocal evidence.

At oral argument before us, counsel for the respondent did not challenge the sufficiency of the evidence to satisfy the Service's burden of proof, but relied solely on the statute of limitations argument, asking that we recede from our holding in Matter of Singh, 13 I&N Dec. 439 (BIA 1969), sustained in Singh v. INS, 456 F.2d 1092 (9 Cir. 1972), cert. denied 409 U.S. 847. We see no reason to do so, and adhere to it. We also reject counsel's argument that the proceedings should be terminated because the Service waited so long (almost a year) after he had requested a hearing before according respondent one. We fail to see how respondent was prejudiced by the delay. Insofar as the evidence is concerned, we are satisfied from our independent review of the record that the immigration judge's fact findings are supported by evidence which is clear, convincing and unequivocal.

ORDER: The appeal is dismissed.

Chairman

A 88

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

STEFANOS ZAOUTIS,

Plaintiff,

-against-

MAURICE KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

----------x

NOTICE OF DEPOSITION

75 Civil 2783 (IBW)

S I R :

PLEASE TAKE NOTICE that at 10:30 A.M. on March 26, 1976 at the offices of Daniel Riesel, Esq., 425 Park Avenue, New York, New York 10022, plaintiff Stefanos Zaoutis will take the deposition upon oral examination of the defendant Immigration and Naturalization Service by a person having knowledge of the contents and the physical custody of the administrative file relating to Stefanos Zaoutis maintained by the said Immigration and Naturalization Service before a notary public or before some other officer authorized by law to administer oaths.

Said examination will continue from day to day until completed. You are invited to attend and cross examine.

Defendant Immigration and Naturalization Service is required to produce upon such deposition the administrative file maintained by said defendant relating to Stefanos Zaoutis, and all books, papers, records, correspondence, documents and memoranda in its custody or under its control which relate to the subject matter of this action, provided, however, that defendant may delete

EXHIBIT F

material that would tend to compromise investigations or reveal the identities of heretofore unknown informers.

Dated: New York, New York
March 18, 1976

Yours, etc.,

Daniel Riesel and Schiano & Wallenstein
Attorneys for the Plaintiff

By _____
Daniel Riesel, Esq.
Winer, Neuburger & Sive
425 Park Avenue
New York, New York 10022
(212) 421-2150

TO:

Thomas Belote, Esq.
Special Assistant United
States Attorney
Courthouse Annex
One St. Andrews Plaza
New York, New York 10007

A 90

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

BARBARA HOLTZ, being duly sworn, deposes and says: Deponent is not a party to the within action, is over 18 years of age and resides at New York, New York.

On the 18th day of March, 1976 deponent served the within Notice of Deposition upon Thomas Belote, attorney for defendants in this action, at Courthouse Annex, One St. Andrews Plaza, New York, New York 10007, the address designated by said attorney for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Barbara Holtz

Barbara Holtz

Sworn to before me this
18th day of March, 1976.

Notary Public

MIRIAM A. CEDEÑA
Notary Public, State of New York
No. 40-452[illegible]
Qualified in Richmond County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

STEFANOS ZAOUTIS,

Plaintiff,

-against-

MAURICE KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and the IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

- x

75 Civil 2783 (IBW)

STATEMENT PURSUANT TO RULE 9(g)

Plaintiff's Statement Pursuant to Rule 9(g) of the General Rules of the United States District Court for the Southern District of New York.

Statement of material facts as to which there is no genuine issue to be tried:

(1) The plaintiff, Stephanos Zaoutis (Zaoutis) is an alien and a citizen of Greece.

(2) Zaoutis legally entered the United States in 1963, and had his status adjusted to that of an alien admitted for permanent residence on August 25, 1965.

(3) On May 20, 1965, the then District Director mailed a letter to Zaoutis stating his intent to commence proceedings rescinding Zaoutis' immigration status.

(4) Zaoutis responded in writing and demanded a prompt hearing, but the Service did not convene a hearing until June 2, 1971.

5. A Special Inquiry Officer did not receive evidence on the merits of the government's rescission case until April 10, 1972.

6. The Special Inquiry Officer rendered his decision rescinding Zaoutis' status on October 15, 1973.

7. The Board of Immigration Appeals dismissed Zaoutis' appeal on May 2, 1974.

Dated: New York, N.Y.
June 21, 1976.

Yours, etc.,

SCHIANO & WALLENSTEIN and
Daniel Riesel
425 Park Avenue
New York, N.Y. 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

STEFANOS ZAOUTIS, 75 Civil 2783 (IBW)

Plaintiff,

-against-

MAURICE KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and the IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

- x

PLAINTIFF'S MEMORANDUM IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

This Memorandum is submitted on behalf of the plaintiff's motion for summary judgment, for the entry of default and for other relief. The plaintiff, Stefanos Zaoutis, is a native of Greece, but claims that his status as a permanent resident of the United States was wrongfully rescinded. The plaintiff commenced this action on June 10, 1975. Although the United States Attorney for the Southern District of New York has acknowledged service and receipt of the complaint, it has not answered or moved with respect to the complaint herein.

On August 25, 1965, the plaintiff adjusted his immigration status to that of a permanent resident pursuant to Section 245 of the Immigration and Nationality Act (hereafter, the "Act"). However, on May 20, 1970, the defendant, District Director's predecessor, mailed Zaoutis a letter stating that he intended to rescind that status. On October 15, 1973, a Special Inquiry Officer rendered a decision and order rescinding the plaintiff's immigration status. It is the contention of the plaintiff that the decision of the Special Inquiry Officer was arbitrary and capricious and more, importantly, for this motion, was untimely because it was not accomplished within five years after the status of Zaoutis had been adjusted and was barred by the provision of Section 246(a) of the Act, 8 U.S.C. § 1256(a), which requires ineligibility to appeal to the satisfaction of the Attorney General within five years of adjustment.

STATEMENT OF THE ISSUES

I.

Does Section 246 of the Act render a rescission action untimely where it could not appear to the satisfaction of the Attorney General that the alien was not, in fact, eligible for an adjustment of status until eight years after that adjustment?

II.

Does Section 246 of the Act and the Regulations promulgated thereunder bar the rescission of an alien's status when the order is entered more than five years after status was adjusted?

STATEMENT OF THE FACTS

The facts are set forth in detail in the affidavit of Daniel Riesel, sworn to on June 21, 1976. The facts may be summarized as follows:

(a) The Plaintiff.

The plaintiff, Stefanos Zaoutis, is a native and citizen of Greece, who lawfully entered the United States on November 6, 1963 as a non-immigrant employee of the Government of Greece. Mr. Zaoutis has maintained a residence within the United States wince that initial entry. He has been assisted by his brother who is a United States citizen. Mr. Zaoutis has been regularly employed in the restaurant business.

(b) Untimely Attempt At Initiation of Rescission.

Prior to January, 1965, Zaoutis worked for the Government of Greece in the City of New York and was in no danger of being deported. In addition thereto, his brother was a United States

Citizen and could have submitted a timely petition to adjust Zaoutis' status from that of a temporary resident to that of a permanent resident. However, on or about January 10, 1965 Zaoutis entered into a marriage in the City of New York with a woman known as Fredeswinda Camacho. Mrs. Zaoutis (nee Camacho) filed a petition to accord the plaintiff nonquota status as a spouse of a United States Citizen pursuant to Section 201(b) of the Act, 8 U.S.C. § 1511(b). The defendant Service approved that petition on May 10, 1965. Thereafter, Zaoutis' immigration status was adjusted to that of a permanent resident on August 25, 1965, pursuant to Section 245 of the Act, 8 U.S.C. § 1255.*

On or after May 20, 1970, Kiley's predecessor, P.A. Esperdy, acting as the District Director of the New York District of the defendant Service mailed the plaintiff a letter (hereafter "the letter of intent"), stating "that the Immigration and Naturalization Service intends to rescind the adjustment of status heretofore granted in your case".

*This process is usually referred to by the Service as "adjustment of status" and the date when Zaoutis' status was adjusted will be referred to hereafter as the "adjustment date".

The letter of intent in pertinent part stated:

> "5. On January 10, 1965 you went through a marriage in New York, New York with Fredeswinda Camacho.
>
> 6. You entered into such marriage ceremony with Fredeswinda Camacho solely for the purpose of obtaining nonquota status under the immigration laws.
>
> 7. You did not intend to enter into a bona-fide marital relationship with Fredeswinda Camacho.
>
> 8. You have never resided with Fredeswinda Camacho as husband and wife and you have never had sexual relations with Fredeswinda Camacho."

The letter of intent further informed the plaintiff that he might:

> "Submit within thirty (30) days from the date of service of notice, an answer in writing under oath setting forth reasons why such rescission should not be made."

The letter of intent also instructed the plaintiff that he might within the same period:

> "request a hearing before a Special Inquiry Officer in support of, or in lieu of, a written answer."

Plaintiff's then counsel responded in writing to the letter of intent* demanding a hearing within a reasonable

*The applicable regulations purporting to govern the rescission of adjustment of status, Title 8 CFR Part 246, did not leave Zaoutis any choice as to his course of action. That regulation provides that upon the failure of a respondent to answer the allegations within thirty days or to demand a hearing the District Director "shall rescind the adjustment of status previously granted, and no appeal shall lie from his decision."

period of time and adhering to the practice permitted under the applicable regulation, did not confirm or deny any of the allegations set forth in the letter of intent. Despite this demand for a reasonably prompt hearing, the defendants failed to convene a hearing before a Special Inquiry Officer until more than a year had elapsed after the letter of intent had been issued and significantly almost six years subsequent to the adjustment date.

On June 2, 1971, the initial hearing was convened before a Special Inquiry Officer. At that time plaintiff moved to terminate the proceedings on the grounds that an action for rescission of his adjustment of status was barred by the five year statute of limitations contained in Section 246(a) of the Act. Plaintiff's counsel also moved the Special Inquiry Officer to terminate the proceedings because of a lack of due process alleging, inter alia, that information relating to the plaintiff's case had been induced within the year prior to the hearing by a fraudulent representation that the plaintiff would not be prosecuted and further that the government had lost its right to proceed by not promptly bringing the rescission issue on for a hearing. These motions were opposed by the Service's Trial Attorney and the Special Inquiry Officer reserved decision on plaintiff's motion to terminate the proceedings, gave the Service and plaintiff two weeks to submit briefs and

then adjourned the hearings without taking any evidence or hearing plaintiff's response to the allegations in the letter of intent.

(c) Evidence Introduced Seven Years After Adjustment.

The Special Inquiry Officer reconvened the rescission proceedings on April 10, 1972, almost two years after the letter of intent was mailed and almost seven years after the adjustment date. At that point, the Special Inquiry Officer had not received any evidence or offer of proof whatsoever that would tend to indicate that plaintiff's adjustment of status should be rescinded. The Special Inquiry Officer failed to address himself to plaintiff's motion based on a want of due process, laches and fraud. However, he denied plaintiff's motion which was based on the five year statute of limitations, and directed the plaintiff to respond to the allegations set forth in the May 20, 1970 letter of intent.

The plaintiff denied the allegations that he entered into a marriage solely for the purpose of committing a fraud upon the Service. The Service called the plaintiff as its first witness, and he indicated that although the passage of time had created considerable problems with his ability to recall details, he had entered into a legitimate marriage with Fredeswinda Camacho. Upon the completion of the plaintiff's

testimony, the Service failed to go forward but adjourned the proceedings to October 2, 1972 at which time it called Fredeswinda Camacho and another witness. Camacho testified that her marriage with the plaintiff was not consummated and that she had entered into such a marriage for monetary considerations.

On October 15, 1973, almost eight years after the plaintiff's status had been adjusted, the Special Inquiry Officer who had been conducting the proceedings rendered his decision and order rescinding plaintiff's immigration status pursuant to 8 CFR § 246.6.

The decision of the Special Inquiry Officer (by then referred to as the "Immigration Judge") reaffirmed his prior decision that the defense based upon the statute of limitations was not available to the plaintiff. The Immigration Judge then reviewed the conflicting testimony and found that the testimony of Fredeswinda Camacho and another government witness, Angel Luis Collazo, was totally credible and that the testimony of the respondent appeared to be not credible. Accordingly, he ordered rescission of the plaintiff's immigration status.

(d) History of the Litigation.

A timely appeal was filed with the United States Board of Immigration Appeals, but on May 2, 1974 the Board of Immigration Appeals dismissed the plaintiff's appeal.

Therearter on June 10, 1975, the instant action was commenced in this Court. The Marshal's return indicates that personal service was effected on the defendant Maurice Kiley on June 11, 1975. The Marshal's return also indicates that the United States Attorney for the Southern District of New York was similarly served and that service upon the Attorney General of the United States was completed on that day by the use of certified mail. The defendant officer and agency of the United States have not appeared, answered or moved with respect to the instant complaint. In September 1975, your deponent spoke to the Special Assistant United States Attorney in charge of immigration matters who indicated that she was aware of the filing of this case and would attempt to remedy the absence of responsive pleadings and motions.

(e) Government's Absence of Knowledge.

In the complaint, served on June 10, 1975, plaintiff alleged that the District Director did not have the requisite knowledge to satisfy the statutory requirements of Section 246(a) of the Act (see e.g. paragraph 30, Second Claim for Relief).

An examination of the administrative file relating to the plaintiff maintained by the Service indicates that prior to the expiration of the five year period, the government did not have any evidence that would tend to demonstrate that the status obtained by Zaoutis was improperly obtained. Indeed, the administrative file contained documentation that tended to support the legitimacy of that adjustment. (See paragraphs 21 to 24 of the Riesel affidavit).

RELEVANT STATUTE

Section 246 of the Immigration and Nationality Act [Act of June 27, 1952 as amended, 66 stat. 163], 8 U.S.C. § 1256:

> (a) If, at any time within five years after the status of a person has been adjusted under the provisions of section 244 of this Act or under section 19(c) of the Immigration Act of February 5, 1917, to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall submit to the Congress a complete and detailed statement of the facts and pertinent provisions of law in the case. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the

> Congress passes a concurrent resolution withdrawing suspension of deportation, the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made. If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling deportation in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made.

ARGUMENT

POINT I.

THE RESCISSION WAS UNTIMELY AND BARRED BY STATUTE BECAUSE IT DID NOT APPEAR TO THE SATISFACTION OF THE ATTORNEY GENERAL THAT ZAOUTIS WAS INELIGIBLE WITHIN FIVE YEARS OF HIS ADJUSTMENT.

(a) Untimely Rescission Means Banishment.

The United States has been Stephen Zaoutis' home since 1963. However, since 1970 he has lived with the threat of banishment. That threat exists because the Service's administrative action rescinded his status as a

permanent resident. The action of the Service is illegal as it flies in the face of the clear congressional policy to allow aliens to remain in the United States after a certain passage of time despite irregularity in their obtaining the status of a permanent resident. That policy is set forth in Section 246(a) of the Act, 8 U.S.C. § 1256. The Section specifically provides:

> "If at any time within five years after the status of a person has been otherwise adjusted...to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status the Attorney General shall rescind the action taken granting an adjustment of status to such person...."

The District Director of the New York District mailed Zaoutis a Notice of Intention to rescind his status on May 20, 1970. At that time, Zaoutis had been living in the United States for seven years. That letter was mailed within the critical five year period which terminated on August 25, 1970. Zaoutis contested the allegations set forth in the Notice and demanded a hearing before a Special Inquiry Officer pursuant to 8 CFR §§ 246 et seq.

Despite Zaoutis' demand for a reasonably prompt hearing, a hearing was not convened until June 2, 1971, six years after the adjustment date, and as Zaoutis' contends, at a time barred by Section 246(a) of the Act. However, even at

that late date, the Government was not prepared to proceed and the Special Inquiry Officer, after hearing motions, adjourned the hearing until May 10, 1972, almost two years after the letter of intent was mailed, and seven years after the adjustment date and in Zaoutis' ninth year of residence in the United States. Zaoutis argued before the Service, as he now contends, that the mere sending of a letter of intent shortly before the expiration of the five year period, does not satisfy the unique requirments of Section 246(a) of the Act. However, the Special Inquiry Officer denied Zaoutis' motion to terminate the rescission proceedings on these grounds and in so doing, described the Government's position as being "that the service of the notice to rescind the adjustment within five years of the adjustment of status tolls the statute of limitations".* A timely appeal was filed by Zaoutis, and eventually the Board of Immigration Appeals sustained the Government's position.

If the Services' construction of the statute is correct, Zaoutis' hope for continuing to live in the United States is severely jeopardized.

*From the decision of the Immigration Judge Exhibit D to the Riesel affidavit of June 21, 1976.

BEST COPY AVAILABLE

(b) Statutory Construction Favors Zaoutis.

The unsuccessful alien in a rescission proceeding is stipped of his right to remain in the United States and faces deportation to a land which may have now become alien to him. Accordingly, the draconian consequences associated with a successful rescission proceeding mandate the method of construing Section 246(a) of the Act. Thus, our Court of Appeals has only recently stated:

> "Deportation and denial of citizenship have, since ancient times, been among the most dreaded governmental sanctions Corniel-Rodriguez v. Immigration and Naturalization Service, Docket No. 75-4096, ____ F.2d ____, (2d Cir., March 22, 1976) at slip opin. page 2721".

It is the rationale that mandates the construction of the Act. Accordingly, "[i]t is a well settled doctrine that deportation statutes must be construed in favor of the alien." Lenon v. Immigration and Naturalization Service, 527 F.2d 187, 193 (2d Cir., 1975).*

The rationale favoring the alien in the construction of the Act was summed up by Mr. Justice Douglas:

> "We resolve the doubts [in favor of the alien] because deportation is a drastic measure and at times the equivalent of banishment.... It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.... Since the stakes are considerable for the individual we will not assume that Congress meant to trench

*The Court of Appeals has also formulated the rule to be that because deportation is a "drastic penalty", statutes providing therefore must be strictly construed. Bonsztejn v. Immigration & Naturalization Service, 526 F.2d 1290 (2d Cir.1975).

> on his freedom beyond that which is required by the narrowest of several possible meaning of the words used." (Citation omitted) Fong Haw Tan v. Phelan, 333 U.S.6, 10 (1948).

Thus, paraphrasing the Court in Fong Haw Tan, the Government's position that "service of a notice to rescind the adjustment of status within five years of the adjustment of status tolls the statute of limitations" trenches on Zaoutis' freedom far beyond that which is required by the narrowest of several possible meaning of the words used by the Congress in enacting Section 246(a).

Accordingly, Section 246(a) must be construed in a broad and liberal manner to favor the alien and doubts as to the meaning of the words of the statute must be resolved in favor of the alien. The decisions of the Special Inquiry Officer and the Board of Immigration Appeals never mention this canon of construction. Indeed, it clearly ignores this principle that has been enunciated by the Supreme Court and reiterated on recent occasions by the Second Circuit.

(c) Mailing the Notice of Intent is Insufficient.

The Government has not only failed to consider the applicable principles relating to construction of the deportation status but they have simply read into the Act certain terms and phrases that were not placed there by Congress. Thus, a restatement of the Government's position

is that the mere mailing of a notice of intention to rescind within five years satisfies the statutory requirement that if "within five years... it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status the Attorney General shall rescind...." In so doing, the Government has actually made two assumptions. Those assumptions are that Section 246(a) of the Act is a conventional statute of limitations and (2) that the mailing of a letter to an alien is sufficient to toll that statute of limitations. Strikingly absent from the Government's argument below are reliance on any particular words and phrases of the Immigration and Nationality Act, citations to legislative history or logic.*

Zaoutis contends that the sending of a letter is not relevant and that the statute requires the Attorney General to be satisfied within five years that the alien was not in fact eligible. This requirement means the Attorney General

*Indeed, subsequent paragraphs of this memorandum will show the very regulations under which the administrative action was taken do not support the Government's two fold position.

must, at the very least, conduct a hearing* within the prescribed period.

* The plaintiff refers to the "trial-type" hearing described by Professor Davis:

> "A 'hearing' is any oral proceeding before a tribunal. Hearings are of two principal kinds - trials and arguments. But the two may be combined with any proportion of each.
>
> A 'trial' is a process by which parties present evidence, subject to cross-examination and rebuttal, and the tribunal makes a determination on the record. The key to a trial is opportunity of each party to know and to meet the evidence and the argument on the other side; this is what is meant by a determination 'on the record'. The opportunity to meet the opposing evidence and argument includes opportunity to present evidence, to present written or oral argument or both, and to cross-examine opposing witnesses." (Footnote omitted).
>
> Davis, Administrative Law (3rd Ed.) 1975. at p. 157.

Zaoutis' arguments before the Special Inquiry Officer and the Board of Immigration Appeals were based to a large extent on the Third Circuit's decision in Quintanna v. Holland, 255 F.2d 161 (3rd Cir. 1958). However, unfortunately for Zaoutis another case was decided in 1972 by the Ninth Circuit, Singh v. Immigration and Naturalization Service, 456 F.2d 1029 (9th Cir.1972) cert. denied, 409 U.S. 847. The Special Inquiry Officer in rejecting Zaoutis' argument merely stated that the Ninth Circuit's decision "unequivocally sustains the Service's position". Accordingly, we think a starting place in this discussion is a comparison of the Singh and Quintanna decisions. A comparison of these two authorities will demonstrate that the Service's position is contrary to the intent and meaning of the Act.

The Court in Quintanna construed the language of Section 246(a) and initially noted that the results "accomplished by a rescission of status is pretty harsh". The Third Circuit then held that the sending of a notice of intent was not a sufficient administrative action to meet the five year requirement of the statute.

The Court reasoned:

> "What is the described action the Attorney General must take? In our opinion the giving of notice is not enough. The statute uses the words 'it shall appear to the satisfaction of the Attorney General' and so forth. We think that something appearing to an officer's 'satisfaction' means that he must have something more than a hunch about it, or even more than that he may be convinced in his own mind. We think it means a reasonable determination made in good faith after such investigation and hearing as is required." (footnote omitted) Quintanna 255 F. 2d at 164.

In reaching its conclusion that a hearing was required the Court noted that the word "satisfy" meant in the context of Section 246(a) "[t]o free from doubt, suspense, or uncertainty, to give assurance to; to set at rest the mind of; to convince..." Quintanna at 164 n.8.

Accordingly, the mailing of a letter is irrelevant because as the Court concluded in Quintanna, nothing can "appear to the satisfaction of the Attorney General" until after some formal hearing and adjudication has taken place. We know from the examination of the administrative record and the administrative file maintained by the Service that nothing could have appeared to the satisfaction of the District Director or the Special Inquiry Officer until the five year period had elapsed.

This is so because not only was there no trial-type hearing, but Zoutis had never made a statement to the District Director within the period specified under Section 246(a) of the Act.

The Second Circuit has also reached the same results as the Third Circuit. In Pierno v. Immigration and Naturalization Service, 397 F.2d 949 (2d Cir., 1968) Judge Smith observed:

> "Section 246(a) empowered the Attorney General to revoke the status adjustment of any person within five years of that person's status adjustment, if it appears to the Attorney General that the person was ineligible for adjustment." Pierno at 951.

Although, the Court did not discuss its rationale, it is clear that the Court concluded that the revocation had to occur within the five year period. This conclusion may even be a more demanding position then the position taken by the Third Circuit.

Of course, the Service is much happier with the Ninth Circuit decision in Singh v. Immigration and Naturalization Service, supra, as that case took a different view of the statute:

> "The language of § 246(a), however, does not compel the conclusion reached in Quintanna. The section simply fails to specify precisely what action must be taken within the prescribed limitation period. The phrase, 'shall rescind the action taken', can be read to require merely the institution of rescission proceedings by service of a notice just as easily as it can be read to require a final decision following a formal hearing. The language of § 246(a), in short, does no preclude a tolling of the statute by the service of a notice, and it is not determinative of the issue before this Court."
> (footnote omitted) Singh at 1095.

In Singh, the Court characterized Section 246(a) as merely a statute of limitations which could be tolled by the mailing of a letter. However, the Singh Court never came to grips with the peculiar language of the statute: "If, at any time within five years ... it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible... the Attorney General shall rescind...." The Court simply shrugs off the marked difference between the language of Section 246(a) and statutes of limitation. Singh, supra, at 1096-1097. The only attempt to reconcile this apparent distinction is the Court's statement that "the actual language of § 246(a) affords no hint as to what Congress' intention was." Singh at 1096. The Ninth Circuit, unencumbered by legislative intent, concluded that the statute of limitations contained in § 246(a) would be tolled

by the Notice of intention to rescind as it analogized that letter to the presentment of an indictment.

We think the short answer to the government's successful argument in Singh is that if Congress wished Section 246 (a) to be a conventional statute of limitations, it could easily have said so. Indeed, Congress has had no difficulty in specifying in great detail various limitations upon governmental action. Thus, in Title 18, U.S.C. § 3282, Congress provided "no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed".* Not is the particular language of Title 18 U.S.C. 3282 of an isolated nature. The language tolling the statute of limitations by

* The historical and revision notes found in the United States Code Annotated indicate that this statute is based on the Act of June 25, 1948, (62 Stat. 828) and was amended by the Act of September 1, 1954, (68 Stat. 1145) and again the Act of September 26, 1961, (75 Stat. 648). Moreover, the reviser's note indicates that this section was meant to incorporate provisions in the Aliens and Nationality Act Title 18 U.S.C. (1940 Edition) § 582 which provided for a three year statute with respect to felonies and fraud against the United States with respect to passports or false statements to a Naturalization Examiner.

the filing of an instrument is found throughout the Criminal Code. Thus, custom's violations cannot be brought "unless the indictment is found or the information is instituted within five years next after the commission of the offense." 18 U.S.C. § 3283. Specific provisions are made for the tolling of the statute of limitations by factors other than the filing of the indictment such as "when the United States is at war", 18 U.S.C. § 3287, or when a person is fleeing from justice", 18 U.S.C. § 3290.

Congress has also been specific in limiting the right of the United States to bring civil actions and to provide for a toll of the statute of limitations with respect to those civil actions. Thus, in 28 U.S.C. § 2415(a) Congress has specifically provided "every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered inapplicable and administrative proceedings required by contract or by law, which occurs later".

Congress, of course, did not make any such provisions with respect to Section 246(a). Not only did Congress fail

to make these provisions in its initial drafting of the 1952 legislation but after the Quintanna decision Congress still did not move to amend or change the statute to conform to the Department of Justice's recent view of the statute. Certainly Congress could have provided a conventional statute of limitations and a tolling provision for rescission proceedings if it intended to do so. Thus, it certainly could have drafted a provision providing that "no person shall have his adjustment of status rescinded unless such rescission proceeding is commenced within five years after his status is adjusted."

Nor, can we reasonably believe that the drafting of Section 246(a) by Congress was the result of a draftsman's inadvertence. Congress was acutely concerned with statutes of limitations and their elimination, when it enacted the 1952 legislation, as prior to 1952 the Immigration law had contained specific statutes of limitation relating to deportability. Thus, the Immigration and Naturalization Act of 1917, 8 U.S.C. § 155 (39 stat. 889) provided that members of a class of excludeable aliens could only be deported "within five years after entry". The Immigration Act of 1924 8 U.S.C. §§ 201 et seq. (43 stat. 153) limited the immigration of aliens into the United States but specified no limitation of time within which such deportation proceedings must be commenced

proceedings must be commenced. However, the 1924 Act did not repeal the five year limitation in the Act of 1917 and this latter provision remained in effect until 1952. United States ex rel Sciria v. Lehmann, 136 F.Supp. 458, 460 (N.D. Ohio, 1955) reversed, 248 F.2d 519 (7th Cir. 1956) cert. denied 357 U.S. 927.

As indicated, in 1952 Congress enacted the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 et seq. (66 stat. 163) by which it repealed the Immigration Act of February 5, 1917, in many respects substantially changing the immigration laws of our country. One of the most striking changes was Congress' abolishment of the five year statute of limitations that had existed since the 1917 Act. Lehmann v. United States, 354 U.S. 1944 (1957) Accordingly, Congress was well aware of the significance of limitations. Accordingly, we see that Congress not only knew how to write a statute of limitations with a tolling provision but it was acutely aware of the significance of limitations in the immigration and nationality area. Given this awareness of Congress, which we suggest is anything but theoretical, Congress certainly would have placed into Section 246(a) a provision that provided for tolling of the time limit if it had intended to draft a conventional statute of limitations.

Perhaps this assumption is especially valid with respect to Section 246(a) of the Act. Section 246 has no analogue in the early Immigration Acts.* Thus, Congress was writing on a clean slate and could have treated rescission as it did the grounds for deportability, that is without any time limits. However, they specifically chose not to do so, and inserted in Section 246 words of limitation that were markedly different from the conventional statute of limitations.

We submit that the reasons for this congressional action can be found in the underlying philosophy that prevails in the current version of the Immigration and Nationality Act. That philosophy reflects the congressional intent to permit aliens to remain in the United States after a sufficient passage of years has expired since their initial entry despite irregularities incurred in their entry or adjustment of status. Accordingly, Section 244 of the Act, 8 U.S.C. 1254 provides for the suspension of deportation for a deportable alien who has been physically present in the United States for a continuous period of not less than seven

* 82nd Cong.,Second Sess., Report No. 1365 at page 197.

years and shows that he is a person of good moral character. Section 249 of the Act, 8 U.S.C. § 1259 permits the Attorney General to create records of admission for permanent residence for certain aliens. In practice, Section 245 of the Act, 8 U.S.C. § 1255 providing for the adjustment of status of aliens within the United States allows aliens* remain in the United States despite the fact that they might be deportable. Discretion in these matters is often favorably exercised where aliens have been in the United States for a substantial period of time.

Finding this intent in the Act is not surprising, for we are, after all, a country of immigrants, and although the immigration laws are designed to eliminate exceptionally undesirable aliens. There is a recognition that once an alien has arrived and conducted himself properly, that he should be allowed to remain in his new home. Cf. Lennon v. Immigration and Naturalization Service, supra.

Thus, the intent of Congress in enacting Section 246(a)

* Section 245 of the Act is the counterpart of the visa issuing process and is only available to aliens who are already within the United States. In the conventional immigration scheme an alien applies for a visa at a United States consul abroad, usually in his home country. See Singh, supra, 456 F.2d at 1093, n.1.

of the Act was to do more than create a statute of limitations. The congressional intent was to create a bar on the removal of aliens if the Attorney General did not substantially accomplish a task of removing the alien within five years.

What Congress did not do and subsequently declined to do cannot be supplied by judicial drafting. We think this is particularly so as Congress obviously meant to prescribe a course of conduct for the government that was significantly different than that conduct prescribed by the conventional statute of limitations set out in Titles 18 and 28 of the United States Code.

POINT II.

AN ORDER OF RESCISSION ENTERED AFTER FIVE YEARS IS TIME BARRED AND PRECLUDED BY THE GOVERNMENT'S REGULATIONS

(a) Introduction.

In Point I we argued that the mailing of a notice of intention to rescind is irrelevant and that the Attorney General, at the very least, must conduct some form of hearing within the five year period. Here, we argue that the Service's interpretation of the statute is inconsistent with the regulatory scheme promulgated at Part 246, Title 8, Code

of Federal Regulations. Of course, it is now well established that a government agency must scrupulously observe its own rules and regulations which it has enacted. United States ex rel Accardi v. Shaughnessy, 347 U.S. 260 (1954). See also Hammond v. Lenfest, 398 F.2d 705 (2'd Cir., 1968).

As a corollary to this principle we submit that an administrative officer cannot assume powers that are not specifically provided for in statutes or regulations. In the words of Judge Frank: "In fairness to the regulated, the provisions of the regulations should not be deemed to include what the administrator, exercising his delegated power, might have covered but did not cover." Tobin v. Edward S. Wagner Co., 187 F.2d 977, 979 (2'd Cir., 1951).

(b) The Regulations Contain No Provision for Tolling.

The argument advanced by the government is that the notice of intention to rescind issued by the District Director tolls the statute of limitation. Assuming arguendo, that section 246(a) of the Act is a conventional statute of limitations, there is absolutely no authority in the statute or the regulations for a tolling of that statute by the issuance of a notice of intent to rescind.* The only

*The notice of intent to rescind is essentially a letter sent to the alien by registered mail.

provision for a notice is provided in 8 CFR § 246(1). That section provides,

> "If it appears to a District Director that a person residing in his district was not in fact eligible for the adjustment of status made in his case, a proceeding shall be commenced by the personal service upon such person of a notice of intention to rescind which shall inform him of the allegations upon which it is intended to rescind the adjustment of his status...."

As indicated, this regulatory section does not contain any reference to a tolling of the statute of limitations. Nor, is such a reference found throughout the entire Part. Accordingly, the District Director has not been specifically delegated any authority to toll the putative statute of limitations and as a general rule, he cannot assume power that he has not received through delegation. cf. Tobin v. Edward S. Wagner Co., supra.

Moreover, if we were to infer an authority to toll the five year period from the delegation under 8 CFR § 246.1, there would be grave constitutional problems involved in such delegation. For, section 246.1 merely states, "if it appears to a district director..." Thus, there is no standard to delineate what must appear to the District Director or to what degree it must appear. There similarly are no standards set forth in section 8 CFR § 246.1 which would preserve some semblence of due process. Accordingly, a district director

which undoubtedly was the situation at bar, could mail out letters tolling the statute upon any whim or caprice.

Once the letter is mailed the alien's rights are seriously affected. Obviously, he becomes subject to rescission proceedings and if he does not contest the allegations in the notice of intent to rescind "the district director shall rescind the adjustment of status previously granted, and no appeal shall lie from his decision." 8 CFR § 246.2. Thus, the action of the district director, triggered by what might "appear" to him has severe consequences to the alien which amount to a deprivation of liberty, and a deprivation of liberty by the government must, of course, be accompanied by due process of law. Board of Regents v. Roth, 408 U.S.564 (1972)*. Accordingly, in an attempt to read the notice provision of part 246 as conferring the ability on the district director to toll the five year provision, would be void for vagueness. Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Staub v. Baxley, 355 U.S. (1958); Southern Railway v.

* Due process is applicable to actions of the Federal Government pursuant to the Fifth Amendment Bolling v. Sharp, 347 U.S. 497 (1954).

Virginia ex rel Shirley, 290 U.S. 190 (1933).

In conclusion, we submit that the district director was not delegated a power to toll the statute under the current regulations, and the vague and broad general section empowering him to send a notice of intention to rescind cannot be a basis for imferring such authority.

(c) The Regulations Demonstrate that the Attorney General Must Rescind Within the Five Year Period.

We submit that the regulations enacted by the Attorney General provide that a Special Inquiry Officer must order rescission within the five year period.* An examination of the regulatory scheme clearly shows that the Attorney General has delegated his obligation to be satisfied that the alien was not entitled to an adjustment of status within five years to special inquiry officers that might hear the case. As we have noted previously, district directors have not been delegated such authority. Clearly, the only

* 8 CFR § 246.7 provides for an appeal of the decision of the Special Inquiry Officer to the Board of Immigration Appeals. The complaint contains a claim for relief alleging that the appeal process must be exhausted within the five year period. However, this Court need not reach that argument because a decision that the district director's mailing of a notice of intent does not act as a tolling of the statute, and that the Special Inquiry Officer must make a decision within the five year period would render this point moot. Out of an abundance of caution, the plaintiff states that he does not waive his arguments with respect to the claim for relief based on an appeal to the Board of Immigration Appeals within the five year period.

administratrive officer that has been delegated authority to make a decision within the statutory mandate is a special inquiry officer. It follows that what he must do is to make a decision which is tantamount to being satisfied, within the meaning of the statute that the alien was not, in fact, eligible for adjustment of status.

The starting place to track the statutory scheme is the delegation of the Attorney General's duties under the immigration and naturalization laws to the Commissioner of Immigration and naturalization laws to the Commissioner of Immigration and Naturalization, 8 CFR §§ 2.1, 100.2. The Commissioner, in turn, has delegated certain of his authority to, among others, district directors and special inquiry officers. See 8 CFR §§ 100.2, 103.1(n) and 103.1(n) and 103.1(p). Special inquiry officers which have certain statutory powers with respect to deportation hearings have been empowered by the regulations to conduct "proceedings for rescission of adjustment of status". 8 CFR § 103.2(p).

Turning to Section 246 of Title 8 CFR, which specifically deals with rescission of adjustment of status an initial provision is: "[i]f it appears to a district director that a person residing in his district was not in fact eligible for adjustment of status made in his case a proceeding shall

be commenced by personal service upon such person of a notice of intention to rescind...." 8 CFR § 246.1. If the notice to rescind is resisted by the alien who is designated the respondent, then "a hearing... shall be conducted by a special inquiry officer ...." 8 CFR § 246.3.

The district director, represented by a government trial attorney prosecutes the government's case before the special inquiry officer. The special inquiry officer is delegated extensive authority to actually participate in the proceedings as the applicable regulations specifically provide that he "shall have authority to interrogate, examine, and cross-examine the respondent and other witnesses to present and receive evidence...." 8 CFR § 246.4. In addition, to this authority, the Attorney General has delegated to the special inquiry officer the responsibility "to determine whether adjustment of status shall be rescinded, to make decisions thereon, including an appropriate order and to take any other action consistent with applicable provisions of law and regulations as may be appropriate to the disposition of the case." 8 CFR § 246.4. The decision of the special inquiry officer "shall include a discussion of the evidence and finding as to the rescission...." 8 CFR § 246.6.

Thus, whatever power the Attorney General has with respect to the actual revocation or rescission of adjustment

of status it now rests firmly in the hands of special inquiry officers. The special inquiry officer's authority is so broad that he might "take any other action consistent with the applicable provisions of law and regulations as may be appropriate to disposition of the case".*

Not only has the delegation of the Attorney General's power to special inquiry officers been extensive, but most importantly, it has been exclusive. Thus, no other administrative officer has been delegated the initial responsibility to be satisfied that the alien was not, in fact, eligible for adjustment of status. Therefore, at the very least, the special inquiry officer must be satisfied within the five year period. Of course, satisfaction under the regulations means that the special inquiry officer must take evidence under and pursuant to the regulatory scheme and satisfaction is tantamount to a decision on his part that the alien was not,

* A judicial gloss has hedged in the power of the Attorney General's delegate under the statute and regulations. Thus, it has been established that the special inquiry officer, if he is to order a rescission, must support his decision by "clear, unequivocal, and convincing evidence" that the facts alleged for rescission are true. Waziri v. United States Immigration and Naturalization Service, 380, 92 F.2d 55 (9th Cir., 1958).

in fact, eligible. In the case at bar, the special inquiry officer was not in a position to be satisfied that the alien was not, in fact, eligible until the statute had run by several years.

(d) No Delegate of the Attorney General Could Have Been Satisfied Within the Five Year Period.

The administrative record and the affidavit of Daniel Riesel indicates that not only did the special inquiry officer not take evidence with respect to the rescission proceedings under the five year period had run, but the administrative file also indicates that the district director did not have the requisite knowledge to be satisfied within the five year period. Thus, the District Director did not take a statement or interview from Zaoutis. The administrative file contains two contradictory affidavits that directly bear upon this issue, and one is an affidavit from Zaoutis' former wife which in great detail states that the marriage was legitimate. Undoubtedly, the district director had some other inklings or suspicions about Zaoutis but he certainly could not have been satisfied within the meaning of the statute during the five year period. Indeed, the letter of intent clearly indicates a hasty attempt to come within the five year period.

Accordingly, not only was the decision to rescind not made within the five year period, but no delegate of the Attorney General had the requicite information to satisfy the statutory requirements.

(e) Summary.

The Service finds it convenient to contend that it can bring itself within the five year bar of section 246(a) of the Act by mailing a "notice" and thereby toll the statute of limitations. Unfortunately, for the Service its own regulations do not provide for such a procedure. Moreover, the regulations vest exclusive authority under section 246(a) of the Act in special inquiry officers. Accordingly, special inquiry officers must be satisfied within the meaning of the statute prior to the expiration of the five year period. In the case at bar, the special inquiry officer was not in a position to rescind until the statutory period had expired.

CONCLUSION

Since the plaintiff's rescission was accomplished long after the five year period had run, and since the Attorney General's delegate could not be satisfied within that period,

the Court should enter an order restoring the plaintiff's lawful status as a permanent resident.

Dated: New York, N.Y.

June 21, 1976.

Yours, etc.,

Schiano & Wallenstein, and
Daniel Riesel of
Winer, Neuburger & Sive
Attorneys for Plaintiff

By Daniel Riesel
Daniel Riesel

425 Park Avenue
New York, N.Y. 10022

THB:cc
75-2021

A 131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

STEFANOS ZAOUTIS,

Plaintiff,

- v -

MAURICE F. KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and the IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

- x

Filed July 20, 1976

ANSWER

75 Civ. 2788 (IBW)

Defendants, by their attorney, Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, for their answer to the complaint herein respectfully allege as follows:

1. Deny allegations contained in paragraphs "1" and "2" of the complaint.

2. Admit the allegations contained in paragraph "3" of the complaint.

3. Neither admit or deny the allegations contained in paragraph "4" of the complaint since it states a conclusion of law.

4. Admit the allegations contained in paragraph "5" of the complaint.

5. Deny knowledge or information sufficient to form a belief in the allegations contained in paragraph "6" except in so far as they relate to the granting of plaintiff's application for adjustment of status.

6. Admit the allegations contained in paragraphs "7", "8" and "9" of the complaint.

7. Admit the allegations contained in paragraph "10" of the complaint only insofar as it alleges that the District Director's action was commenced pursuant to 8 U.S.C. §1256(a) and 8 C.F.R. §246.1; deny those other allegations contained in paragraph "10" and in particular those allegations which state personal service of the notice was required under 8 C.F.R. §246.1 at the time this notice was served.

8. Deny the allegations contained in paragraph "11" of the complaint.

9. Admit the allegations contained in paragraph "12" of the complaint but deny knowledge or information sufficient to form a belief as to when the plaintiff desired a hearing in this matter.

10. Deny the allegations contained in paragraph "13" of the complaint except insofar as it alleges that a hearing was convened on June 2, 1971.

11. Admit the allegations contained in paragraph "14" of the complaint insofar as they allege that plaintiff's counsel moved on June 2, 1971 that the proceedings be terminated as being barred by a time limitation under 8 U.S.C. §1251(a) and that the hearing was subsequently adjourned; deny the other allegations contained in paragraph "14".

12. Deny the allegations contained in paragraph "15", except insofar as it alleges that the hearing was reconvened on April 10, 1972 and that the Immigration Judge denied the plaintiff's motion that the proceedings be terminated as barred by a five year statute of limitations.

13. Admit the allegations contained in paragraph "16" of the complaint.

14. Admit the allegations contained in paragraph "17" of the complaint but deny that the plaintiff testified that the passage of time had created considerable problems with his ability to recall details relating to his prior marriage.

15. Admit the allegations contained in paragraphs "18" and "19" of the complaint.

16. Deny the allegations contained in paragraph "20" of the complaint, but refer the Court to the decision of the Immigration Judge for the full contents and meaning thereof.

17. Admit the allegations contained in paragraph "21" of the complaint insofar as they reflect that the plaintiff filed a timely notice of appeal to the Board wherein he stated that the recission proceedings should be terminated as being barred by the statute of limitations and that the Immigration Judge's decision was not substantiated by clear, convincing and unequivocal evidence; deny the other allegations were properly raised in the notice of appeal to the Board of Immigration Appeals.

18. Admit the allegations contained in paragraph "22" of the complaint.

19. Defendants repeat and reallege their responses to paragraphs "1" through "22" of the complaint as if they were set forth in full in paragraph "23" of the complaint.

20. Admit the allegations contained in paragraph "24" of the complaint.

21. Deny the allegations contained in paragraph "25" of the complaint.

22. Defendants repeat and reallege their responses to paragraphs "1" through "25" as if they were set forth in full in paragraph "26" of the complaint.

23. Admit the allegations contained in paragraph "27" of the complaint except insofar as they may suggest that there exists an illegal delegation of power with respect to recission proceedings under 8 U.S.C. §1256(a).

24. Deny the allegations contained in paragraph "28" of the complaint since it states a conclusion of law.

25. Deny the allegations contained in paragraphs "29", "30" and "31" of the complaint.

26. Defendants repeat and reallege their responses to paragraphs "1" through "31" as if they were fully set forth in paragraph "32" of the complaint.

27. Deny the allegations contained in paragraph "33" of the complaint.

28. Defendants repeat and reallege their responses to paragraphs "1" through "33" as if they were fully set forth in paragraph "34" of the complaint.

29. Deny the allegations contained in paragraphs "35" and "36" of the complaint.

30. Deny knowledge and information sufficient to form a belief as to the allegations contained in paragraph "37" of the complaint but admit that the

Immigration Judge rendered a decision in the recission proceedings on October 15, 1973.

31. Deny the allegations contained in paragraph "38" of the complaint.

32. Defendants repeat and reallege their responses to paragraphs "1" through "38" as if they were fully set forth in paragraph "39" of the complaint.

33. Deny the allegations contained in paragraph "40" of the complaint since it states a conclusion of law.

34. Deny the allegations contained in paragraph "41" of the complaint.

35. Defendants repeat and reallege their responses to paragraphs "1" through "41" of the complaint as if they were fully set forth in paragraph "42" of the complaint.

36. Deny the allegations contained in paragraph "43" of the complaint.

37. Defendants repeat and reallege their responses to paragraphs "1" through "43" as if they were fully set forth in paragraph "44" of the complaint.

38. Admit the allegations contained in paragraph "45" of the complaint.

39. Deny the allegations contained in paragraph "46" of the complaint.

40. Defendants repeat and reallege their responses to paragraphs "1" through "46" of if they were fully set forth in paragraph "47" of the complaint.

THB:cc
75-2021

41. Deny the allegations contained in paragraphs "48" and "49" of the complaint.

42. Defendants repeat and reallege their responses to paragraphs "1" through "49" as if they were fully set forth in paragraph "50" of the complaint.

43. Deny the allegations contained in paragraph "51" of the complaint.

FIRST AFFIRMATIVE DEFENSE

44. The Court lacks subject matter jurisdiction.

SECOND AFFIRMATIVE DEFENSE

45. The complaint fails to state a cause of action upon which relief can be granted.

WHEREFORE, defendant demands judgment dismissing the complaint herein, with costs and disbursements of the action, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
July 20, 1976.

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York,
Attorney for Defendants,

By: _____
THOMAS H. BELOTE
Special Assistant United States
Attorney
Office & P.O. Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-9166

TO: DANIEL RIESEL, ESQ.
Winer, Neuburger & Sive
425 Park Avenue
New York, New York 10022

THB:ml
75-2021

A 137

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

STEFANOS ZAOUTIS, :

Plaintiff, :

- v - : NOTICE OF MOTION FOR SUMMARY JUDGMENT

MAURICE F. KILEY, as District Director for the Immigration and Naturalization Service, and the IMMIGRATION AND NATURALIZATION SERVICE, : 75 Civ. 2783 (IRW)

Defendants. :

- x

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit and Rule 9(g) Statement of Thomas H. Belote, Special Assistant United States Attorney for the Southern District of New York, and upon all papers filed in proceedings had herein, the undersigned will move this Court on the 6th day of August, 1976 at 2:30 P.M. before the Honorable Inzer D. Wyatt, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting summary judgment for the defendants and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
July 26, 1976.

HB:ml
5-2021

A 138

Yours, etc.,

ROBERT B. FISKE, Jr.,
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: _____

THOMAS H. BELOTE,
Special Assistant United States
Attorney
Office & P.O. Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-9166

TO: DANIEL RIESEL, Esq.,
Winer, Neuburger & Sive
425 Park Avenue
New York, New York 10022

THB:ml
75-2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

STEFANOS ZAOUTIS,

Plaintiff,

- v -

MAURICE F. KILEY, as District Director for the Immigration and Naturalization Service, and the IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

75 Civ. 2783 (IBW)

- x

STATE OF NEW YORK :
SS.:
COUNTY OF NEW YORK :

THOMAS H. BELOTE, being duly sworn, deposes and says:

1. I am a Special Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York and as such I am familiar with this case. I submit this affidavit in opposition to plaintiff's motion for summary judgment and in support of the defendants' cross-motion for summary judgment. This affidavit is based upon the administrative file of the Immigration and Naturalization Service (the "Service") relating to the plaintiff, Stefanos Zaoutis.

2. The plaintiff is an alien, a native and citizen of Greece who was admitted to the United States on November 6, 1963 as a nonimmigrant visitor.

3. On January 10, 1965 the plaintiff went through a marriage ceremony with a United States citizen, Fredeswinda Camacho, on whose visa petition he was later accorded nonquota status as the spouse of a United States citizen. On August 25, 1965, he was granted permanent resident status under Section 245 of the Immigration and Nationality Act, 8 U.S.C. §1255 by reason of his marriage to a United States citizen.

4. Although it appears that the alien is the brother of a United States citizen I have been advised by the Department of State and the Service that the alien-plaintiff could not have obtained permanent resident status on the basis of that relationship between the date of his entry, November 6, 1963, and the date when he acquired resident status by reason of his marriage to Fredeswinda Camacho. During that period the existing immigration laws operated under a quota system which allotted only 308 visas to prospective Greek immigrants. Between November, 1963 and August, 1965 fourth preference visas (i.e., brothers of a United States citizen) were unavailable to Greek visa applicants because the quota was oversubscribed. It therefore appears that the only manner in

which the plaintiff could have obtained an immigrant visa during that period was to obtain nonquota status. This he achieved in 1965 when he entered into a marriage with a United States citizen.

5. On April 5, 1967 the plaintiff divorced Fredeswinda Camacho in a Mexican divorce proceeding and on October 1, 1967 he entered into a marriage with Helene Gaglia, a native and citizen of Greece.

6. During this period the Service was conducting an investigation into a large scale conspiracy involving Greek citizens who were fraudulently marrying United States citizens in order to obtain benefits under the immigration laws. This Service inquiry related not only to an investigation into whether particular aliens had obtained permanent residence by the use of sham marriages, but was also conducted in order to obtain evidence against the third party organizers and arrangers of that marriage fraud ring. Accordingly, the investigation proceeded at a deliberate pace in order not to jeopardize pending and potential criminal prosecutions.

7. As a result of this investigation the plaintiff's marriage to Fredeswinda Camacho came under review as one of the marriages that had been entered into solely for the purpose of obtaining immigration benefits

in violation of the law. The review of the plaintiff's marriage appears to have been initiated as a result of information received by the Service from Peter Timon that plaintiff's marriage was one of a number of sham marriages that had been arranged by Angelo Collazo and James Kaperonis. Kaperonis was subsequently convicted on May 26, 1966 for his participation in a marriage fraud conspiracy which conviction became final in 1969. Angelo Collazo was also convicted on April 1, 1969 in the United States District Court for the Southern District of New York for his involvement in arranging sham marriages in order to circumvent the immigration laws.

8. The investigation of the plaintiff's marriage continued and on March 25, 1969 Fredeswinda Camacho was requested to appear at the Service district office in New York to testify as to the bonafides of her marriage to Stefanos Zaoutis.

9. During that interview Camacho stated in an affidavit that although she married Zaoutis for love they had since had marital difficulties and were subsequently divorced (Exhibit A).

10. In light of Camacho's refusal to admit that her marriage had been entered into solely for the

purpose of obtaining immigration benefits for the plaintiff, the Service's investigation continued (Exhibit B). In February, 1970 the Service obtained the cooperation of Angelo Collazo. Collazo was requested to appear at the Service district office in New York on February 24, 1970 in order to confront Camacho with respect to her former statements regarding the bonafides of her marriage to plaintiff Stefanos Zaoutis. Camacho was requested to appear at the Service district office on that same date.

11. On February 24, 1970 Fredeswinda Camacho, while represented and in the presence of counsel, gave a Service investigator a full and complete sworn statement regarding the sham marriage that she entered into in order that the plaintiff could obtain permanent residence in the United States (Exhibit C).

12. On May 20,1970 the District Director issued a notice of intention pursuant to 8 U.S.C. 1256, to recind the plaintiff's adjustment of status on the ground that Zaoutis was not in fact eligible for his adjustment of status because his marriage to Fredeswinda Camacho was a sham. Therefore it was insufficient to entitle him to the nonquota status and permanent residence he had achieved on the basis of that marriage (Exhibit D).

13. On June 10, 1970 counsel for the alien responded and requested a hearing before an Immigration Judge concerning the notice of intent.

14. Thereafter the recission proceedings were held in abeyance in part because of a request by a Bar Association disciplinary committee investigation (Exhibit E).

15. On June 2, 1971 a recission hearing was commenced before Immigration Judge Joseph J. Mack. At the commencement of that hearing counsel requested that the recission proceedings be terminated on the ground that the proceedings were barred by the statute of limitations (Exhibit E, p. 2). The Service's Trial Attorney, representing the District Director, opposed the alien's motion. The Immigration Judge thereafter reserved decision on that motion and requested the opposing parties to submit briefs on the issue prior to rendering his decision (Exhibit E, p. 4). Although decision on that motion was reserved the Immigration Judge directed the Service to proceed with its case against the alien (Exhibit E, p. 4). Plaintiff's counsel in the administrative proceedings objected to proceeding forward with the hearing prior to receiving the Immigration Judge's decision on the motion relating to the statute of limitions issue. The Service's Trial Attorney consented to the alien's

request for an adjournment of the proceedings conditioned upon a time limitation (Exhibit E, p. 7). The Immigration Judge thereafter adjourned the hearing without date pending his decision on the alien's motion to terminate the proceedings.

16. On April 10, 1972 the recission hearing was reconvened and the Immigration Judge, Joseph Mack, denied the alien's motion to terminate the proceedings (Exhibit F, p. 11). The alien, Stefanos Zaoutis, was called to testify as the first witness in the proceeding. He testified that he had met Fredeswinda Camacho at an exposition in Queens, New York. He further testified that he did not remember the address of his former wife prior to their marriage; the number of times he saw his wife prior to their marriage; the date of the marriage; the witnesses to that marriage; or whether he had met Fredeswinda Camacho directly or through a third party. Other aspects of his testimony were equally self-serving and conspicuously vague.

17. After the Service's Trial Attorney concluded his direct examination of the alien, Zaoutis' counsel declined to proceed with the cross-examination of the alien. Instead, Zaoutis' counsel requested that the alien be permitted to present his case together from beginning to end. Accordingly, the hearing was adjourned until June 22, 1972 by the Immigration Judge in order for the Service to secure the presence of other witnesses.

THB:ml
75-2021

18. On June 9, 1972 Zaoutis' counsel submitted a written request adjourning the hearing from its scheduled date of June 22, 1972. Noting that Zaoutis was in Greece at the time with his second wife, counsel for the alien requested that the hearing be put over until September, 1972 (Exhibit G). The Service's witnesses were again contacted and the Service arranged to have them appeaz on a new date.

19. On October 2, 1972 the hearing was reconvened. At the commencement of that hearing the Service Trial Attorney advised the Immigration Judge that Zaoutis' counsel was unable to appear for the reconvened hearing but that he had no objection to the hearing proceeding in his absence (Exhibit H). Counsel specifically waived cross-examination of the Service's witnesses that were to be presented at the reconvened hearing. The alien was present at the hearing and as in the prior proceedings was provided with an interpreter.

20. During the June 22nd proceedings the Service Trial Attorney called as its first witness, Angelo Collazo. Collazo testified that during the period of 1964-1965 he was connected with an attorney's office in the capacity of counselor on marriages and in that capacity he found United States citizen women to marry aliens so

that they could adjust their immigration status in the United States. Collazo further testified as to how he arranged the sham marriage between Fredeswinda Camacho and Stefanos Zaoutis. His testifony as to the arrangement of that marriage, the monetary consideration paid to Fredeswinda Camacho for entertaining this venture, and the agreement between the parties as to separate living arrangements was clear, convincing and unequivocal.

21. The Service Trial Attorney then called Fredeswinda Camacho, the United States citizen Zaoutis married to obtain immigration benefits in 1965. She also testified, corroborating Collazo's testimony in detail, as to how the marriage had been arranged for monetary consideration; how the parties lived separately; how the marriage was to continue only for one year prior to the alien obtaining a prearranged divorce. At the conclusion of the testimony of the witness the Immigration Judge adjourned the hearing advising Zaoutis to notify his attorney to appear at the next hearing.

22. At the reconvened hearing on February 7, 1973 Zaoutis' counsel advised the Immigration Judge that he had received a transcript of the testimony given on October 2, 1972. Despite his prior contention that he wished to present the alien's case at one proceeding,

26. On January 21, 1976 oral agrument was heard before the Board on the pending appeal (Exhibit L). During that argument upon the inquiry of the Chairman of the Board of Immigration Appeals, Zaoutis' counsel was unable to demonstrate how the long duration of the administrative proceedings below prejudiced his client's cause.

27. On May 2, 1974 the Board rendered its decision dismissing Zaoutis' appeal and finding that an independent review of the record demonstrated that the Immigration Judge's fact finding was supported by clear, convincing and unequivocal evidence. The Board further noted that they were unable to determine how Zaoutis had been prejudiced by any delay occurring between the service of the notice of intent and the commencement of recission hearings in this matter (Exhibit M).

28. It is respectfully submitted that the decision of the Immigration Judge and the Board of Immigration Appeals correctly interpreted the applicable law relating to these recission proceedings and that their fact findings are supported by clear, convincing and unequivocal evidence contained in the record of these proceedings.

29. It is further submitted that plaintiff's allegations that the District Director could not have

counsel for Zaoutis informed the Immigration Judge that they had no further evidence that they wished to present in relation to these proceedings (Exhibit I). The hearing was then closed by the Immigration Judge who informed counsel for both parties that he would reserve a decision on the matter and would render a written decision in the matter at a later date.

23. On October 15, 1973 the Immigration Judge rendered his decision in the recission proceedings (Exhibit J). In that decision he found that the proceedings were not barred by a time limitation in 8 U.S.C. §1256 and that the Service had proved by clear, convincing and unequivocal evidence that Zaoutis was ineligible for adjustment of status based on his marriage to Fredeswinda Camacho. Accordingly he ordered that the recission be granted.

24. On October 24, 1973 Zaoutis filed a notice of appeal from the decision of the Immigration Judge to the Board of Immigration Appeals. In that notice Zaoutis claimed that the proceedings were barred by a statute of limitation and that the Immigration Judge's decision was not based on clear, convincing and unequivocal evidence existing in the record (Exhibit K).

25. On January 16, 1974 Zaoutis' counsel filed a brief in support of his appeal before the Board.

THB:ml
75-2021

been satisfied that a fraudulent marriage existed prior to initiating the recission proceedings is totally without merit.

WHEREFORE, it is prayed that the plaintiff's motion for summary judgment be denied in all respects and further that this Court grant defendants defendants' cross-motion for summary judgment dismissing this action.

/s/

THOMAS H. BELOTE
Special Assistant United States Attorney

Sworn to before me this
26 day of July, 1976.

75-2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

STEFANOS ZAOUTIS,

Plaintiff,

- v -

MAURICE F. KILEY, as District Director for the Immigration and Naturalization Service, and the IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

RULE 9(g) STATEMENT

75 Civ. 2783 (IBW)

- x

STATE OF NEW YORK :
COUNTY OF NEW YORK : SS.:
SOUTHERN DISTRICT OF NEW YORK :

THOMAS H. BELOTE, being duly sworn, deposes and says:

1. I am a Special Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, attorney for the defendants herein, and as such I am in charge of this action. Defendants, by their attorney, Robert B. Fiske, Jr., submit this statement of facts pursuant to Rule 9(g) of the General Rules of the Southern District of New York, and contend that as to the following material facts there is no genuine issue to be tried.

B:ml
-2021

2. The plaintiff Stefanos Zaoutis is an alien and a native and citizen of Greece.

3. Zaoutis entered the United States as a nonimmigrant visitor who on August 25, 1965 was granted permanent resident status under Section 245 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1255 by reason of his marriage to Fredeswinda Camacho, a United States citizen.

4. On May 20, 1965 the District Director of the Immigration and Naturalization Service at New York commenced recission proceedings against Zaoutis pursuant to 8 C.F.R. §246.1 and 8 U.S.C. §1256.

5. On October 15, 1973, after a hearing on the recission proceedings, an Immigration Judge rendered a decision rescinding the plaintiff's status.

6. On May 2, 1974 the Board of Immigration Appeals affirmed the decision of the Immigration Judge and dismissed the plaintiff's appeal.

Dated: New York, New York
July 26, 1976

THOMAS H. BELOTE, Special
Assistant United States Attorney
Office & P.O. Address:
United States Courthouse Annex
One St. Andrew's Plaza

A 153

Form I-215B
(Rev. 4-1-68)

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

RECORD OF SWORN STATEMENT IN AFFIDAVIT FORM

AFFIDAVIT

IN RE: ZAOUTIS, Stefanos FILE NO. A13 942 820
EXECUTED AT 20 W. Broadway, New York City DATE March 25, 1969
Before the following officer of the U.S. Immigration and Naturalization Service:

Donald B. Leggett, Investigator
in the Spanish language. Interpreter none used.

I, Fredeswinda CAMACHO, acknowledge that the above-named officer has identified himself to me as an officer of the United States Immigration and Naturalization Service, authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. He has informed me that he desires to take my sworn statement regarding: my marriage to Stefanos ZAOUTIS and the visa petition I filed in his behalf with the Immigration Service.

He has told me that my statement must be freely and voluntarily given and has advised me of these rights:

"You have the right to remain silent.

Anything you say can be used against you in court, or in any immigration or administrative proceeding.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer."

I am willing to make a statement without anyone else being present. I swear that I will tell the truth, the whole truth, and nothing but the truth, so help me, God.

Being duly sworn, I make the following statement: My name is Fredeswinda CAMACHO. I was married to Stefanos ZAOUTIS and my name was Fredeswinda ZAOUTIS, but now we are divorced. I met Stefanos at the World's Fair in the last part of October of 1964. We went together for about three or four months. He asked me to marry him and I accepted his proposal. Before we were married, I lived at 1138 De Kalb Ave., Brooklyn, New York. When we married, we found an apartment at 226 Central Ave., Brooklyn, New York and we lived there together for about eight or nine months. We began to have arguments and finally he moved out. I stayed there about six months more then moved to 336 W. 170th Street, Bronx, New York to live with my sister. I lived there about one year then moved to live with a friend at 122nd Stc. between 6th and 7th Ave., New York City. I lived there about one year then moved to my present address at 335 W 19th Street, New York City, Apt. 1C. I married my husband for love. I went to the doctor for my marriage examination by my self. I do

A-154

not remember any of the witnesses to the marriage. We went to a church in Mamaica, Queens to be married. Afterward we went to a restaurant in Brooklyn. After we broke up ~~about~~ fifteen months ~~after our marriage,~~ Stefanos went to Mexico to get a divorce. I do remember that we went to a lawyer named Timon after we were married and I signed some papers that would help Stefanos become a permanent resident. I do not remember signing any other papers.

F.C

The above statement has been read to me in the Spanish language and is true and correct.

Fredeswinda Camacho
Respondent

The above statement has been subscribed and sworn to before me at 20 W. Broadway New York City on March 25, 1969.

Donald B. Liggett
Donald B. Liggett, Atty.

A 155

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

AVISO DE DERECHOS

Antes de que le hagamos cualquier pregunta, usted debe de comprender sus derechos:

Usted tiene el derecho de guardar silencio.

Cualquier cosa que usted diga puede ser usada en su contra en un juzgado de leyes, o en cualquier procedimiento administrativo o de inmigración.

Usted tiene el derecho de hablar con un abogado para que el lo aconseje antes de que le hagamos alguna pregunta, y de tenerlo presente con usted durante las preguntas.

Si usted no tiene el dinero para emplear a un abogado, se le puede proporcionar uno antes de que le hagamos alguna pregunta, si usted lo desea.

Si usted decide contestar nuestras preguntas ahora, sin tener a un abogado presente, siempre tendrá usted el derecho de dejar de contestar cuando guste. Usted también tiene el derecho de dejar de contestar cuando guste, hasta que pueda hablar con un abogado.

RENUNCIA

He leido esta declaracion de mis derechos y comprendo lo que son mis derechos. Estoy dispuesto a dar una declaración y a contestar preguntas. Por ahora no deseo un abogado. Comprendo y sé lo que estoy haciendo. No me han hecho promezas ni me han amenazado, ni han usado presión o fuerza en mi contra.

Fredesvindo Conrado
Firma

Fecha y hora: MARZO 25 1969 Lugar: 20 W. BROADWAY

CERTIFICATION

I HEREBY CERTIFY that the foregoing Warning and Waiver were read by me to the above signatory, that he also read it and has affixed his signature hereto in my presence.

Donald R. Taggett
Immigration Officer Signature

Witness' Signature

Interpreter's Signature Language

Interpreter's Address

Form I-214 (Spanish)
(Rev. 11-24-67)

A 156

MEMORANDUM FOR FILE

File: A13 942 820

Date: May 13, 1969

Re: STEFANOS ZAUOTIS

It is recommended that this case be reassigned as there are strong indications that the marriage was contracted as a sham and a fraud.

Witnesses to the marriage appear to be Angel Collazo and Harry Andreappolis, known marriage arrangers. Attorney Timon has surrendered Blank Power Of Attorney signed by spouse, and identified marriage as a fraud.

Spouse and Subject both deny marriage fraud. However, evidence is too strong to close case at this time.

Donald B. Leggett

Donald B. Leggett,
Investigator

Statute tolls 8/26/70

Collazo is on probation in SDNY [illegible]

A 157

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

RECORD OF SWORN STATEMENT

Office: 20 West Broadway, New York, New York File No.: A13 942 820

Statement by: FREDESWINDA CAMACHO

In the case of: STEFANOS ZAOUTIS

At: 20 West Broadway, New York, New York Date: February 24, 1970

Before: Timothy Whelan, Investigator
(Name and Title)

In the Spanish language. Interpreter Anthony Alvarenga used.

I am an officer of the United States Immigration and Naturalization Service, authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. I desire to take your sworn statement regarding: your part in your marriage to STEFANOS ZAOUTIS and the papers that you signed before this Servicd pretendings to ne his wife for his permanent residence.

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court, or in any immigration or administrative proceeding.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

Q. Do you wish to have a lawyer or any other person present to advise you?
A. Yes. MR. JULIUS BIERVLIET - Legal Aid Society is present.

Q. Are you willing to answer my questions at this time?
A. Yes.

Q. Do you swear that all the statements you are about to make will be the truth, the whole truth and nothing but the truth, so help you God?
A. Yes.

Q & A Statement of FREDESWINDA CAMACHO, File No. A13 942 820

Q. What is your full, true and correct name?
A. FREDESWINDA CAMACHO.

Q. When and where were you born?
A. October 25, 1942 in Mayaguez, Puerto Rico.

Q. And you are a citizen of the United States?
A. Yes.

Q. Your attorney MR. BIERVLIET is representing you here today?
A. Yes.

Q. You understand that no threats and no promises have been made against you. You understand that your statement is given freely and voluntarily?
A. Yes.

Q. What was your address in the latter part of 1964?
A. I don't remember. I think it was on DeKalb between Bushwick and Broadway.

Q. With whom were you living?
A. Alone.

Q. You were not living with your sister?
A. No.

Q. When were you first introduced to the idea of getting married to a Greek alien?
A. I don't remember. I think it was November or December 1964.

Q. Who introduced you to the idea?
A. ANGELO COLLAZO.

Q. How did he go about presenting the idea of marrying a Greek to you?
A. He began talking to me. He asked me if I was married and I said no. He asked me if I wanted to get married to a Greek young fellow. This Greek would give me money and I would not have to live with him and that eventually I could divorce him.

Q. And this was explained to you by MR. COLLAZO before marrying the Greek?
A. Yes.

Q. Where did this meeting take place?
A. In a bar.

Q. In Brooklyn?
A. Yes.

Q. Was anybody else present to witness this?
A. No.

Q. Did you agree right away?
A. No. I told him that I was going to think it over. It was the following day I told him yes.

Q. Did he tell you how much money you would get?
A. Y es.

Q. How much?
A. $350.00

Q. Then you saw him the following day? Was it in the same bar?
A. No, not the following day about two or three days after in the city.

Q. What did he tell you then?
A. He said he would let me know when I can get married.

Q. When was the next time that you heard from him?
A. About a month and a half after.

Q. What happened?
A. He told me that we can get married the following day.

Q. Did he come to your house?
A. He called me on the telephone at the house of a girlfriend's of mine. I told him to wait for me in front of my house and then he told me that the following day we were going to get married.

Q. Did you tell anybody else about this?
A. No.

Q. Then what happened?
A. We went to the doctor.

Q. Is this the following day after he called you on the telephone?
A. Yes. The same day we went to get married. The doctor gave me a certificate and then the doctor spoke to COLLAZO. Then we went to Queens to get married.

Q. Did the doctor take your blood?
A. No.

Q. Did COLLAZO take you to the doctor's office in his car?
A. Yes.

Q. Do you know where the doctor's office is located?
A. I don't know exactly.

Q. Did ANGELO drive you from the doctor's office to Queens?
A. Yes.

Q. The what happened?
A. STEVE ZAOUTIS was there with two other men.

Q. Who else was there?
A. Two other persons were there with him.

Q. Greek boys?
A. I don't know.

Q. Did you fill out any papers?
A. No, we didn't get married there.

Q. Didn't you fill out an application for a marriage license?
A. I didn't fill it out . They refused to marry me because I didn't have any identification.

Q. Did you try to get married in Queens Boro Hall?
A. No, because we left and we came right over to New York.

Q. You left the Boro Hall to come to New York, New York?
A. Yes, and we got married here.

Q. When you filled out the application, the Application for the License to Marry, you know that there are two columns. One about the bride and the other one about the groom?
A. I didn't fill it out ANGELO did.

Q. How about the Greek?
A. I don't know.

Q. What kind of identification did the official want from you?
A. Birth certificate.

Q. So what happened then?
A. We came to Manhattan.

Q & A Statement of FREDESWINDA CAMACHO, File No. A13 942 320

Q. What did you do in Manhattan?
A. We did the same thing but they didn't ask for my identification.

Q. When you went to Manhattan, did ANGELO also fill out the application?
A. Yes.

Q. So then what happened?
A. We got married.

Q. Where?
A. In the City Hall. Then we went to a church in Queens.

Q. You were married in City Hall?
A. Yes then we also got married in the church.

Q. Did they say why they did that?
A. No.

Q. When you were in the City Hall of Manhattan, did you go into a chapel?
A. No. They took us to a place where there was an American flag. We raise our hands then we went to another room where wer were interviewed by a lady.

Q. So the what happened?
A. Then we went to the church.
A
Q. Where is the church?
A. In Queens.

Q. Who was present at the marriage ceremony in the church?
A. ANGELO and two friends of ZAOUTIS, ZAOUTIS and I.

Q. Who signed as witnesses to your marriage.
A. ANGELO COLLAZO and one of the other friends I believe.

Q. Did you see ANGELO sign the marriage certificate?
A. I saw him write on the paper. But I couldn't tell if he was signing.

Q. Afteryou left the church where did you go?
A. We went to the lawyer's office.

Q. Where is that?
A. Manhattan on Park Avenue or Broadway.

Q. Did you know the lawyer's name?
A. I forgot. MR. TIMON.

Q. What happened in the lawyer's office?
A. They called me in and had me sign some papers, and then they told me these were papers for STEVE'S permanent residence.

Q. Who was in the lawyer's office?
A. ANGELO, STEVE'S two friends, STEVE and lawyer and another gentlemen who was the lawyer next door and his secretary.

Q. Did you have a conversation with the lawyer about the marriage?
A. No.

Q. Did he tell you that youwould not have to live with STEVE?
A. ANGELO explained that to me before.

Q. I'm going to show you an immigration Form I-130, which is a Petition to Classify a Relative so he can remain in the United States. I am going to show you your signature. Is this the Form that you signed in the lawyer's office?
A. Yes.

Q. Did you sign this in the lawyer's office?
A. I don't remember.

Q. I am going to show you the consent of power of attorney. Will you identify that signature as yours?
A. Yes.

Q. Was it explained to you or did you know what was contained on the forms that you were signing?
A. No.

Q. Did MR. COLIAZO or MR. TIMON tell you what the forms were for?
A. COLIAZO told me that since STEVE wasn't an American citizen I would have to sign the papers for him to remain here.

Q. Did you leave the lawyer's office after you signed the papers?
A. Yes.

Q. Where did you go?
A. To my house.

Q. Was that DeKalb Avenue?
A. Yes.

Q & A Statement of FREDESWINDA CAMACHO, File No. A13 942 820

Q. This petitioner on which you identify your signature as being yours shows that the address in the United States which you were living was 226 Central Avenue?
A. No, we got the apartment after we were married. About two or three days later.

Q. You moved after you were married?
A. Yes, about a week after.

Q. Where did you move?
A. Central Avenue.

Q. Was it 226 Central Avenue?
A. Yes.

Q. Who paid for the apartment?
A. STEVE.

Q. After you signed the papers you left the lawyer's office?
A. Yes.

Q. Where did STEVE go?
A. I don't know.

Q. Did ANGELO drive you home?
A. Yes.

Q. When did ANGELO give you the money?
A. The same day we got married in the office.

Q. What office?
A. The lawyer's office.

Q. How much did he give you?
A. $350,00.

Q. Did he also promise you that you would get money for the apartment
A. No. He said that STEVE would pay all the expenses.

Q. Did ANGELO say it was necessary for you to move some men's clothes in the apartment?
A. Yes.

Q. Did you bring them in?
A. STEVE brought them to my apartment.

Q. When was that?
A. STEVE painted the apartment and after he painted he left his clothing there.

Q. How many times did he come to your apartment?
A. One week he gave me $26.00. He gives me this for a week.

Q. For how long?
A. A Year and a half.

Q. Did he pay for the furniture in the apartment?
A. Yes.

Q. Did he pay for the rent?
A. He paid everything.

Q. Did he sign the lease?
A. Yes.

Q. Did he put his name on the mailbox?
A. Yes.

Q. Did you ever come to the Immigration office?
A. Yes, about a month and a half after we got married.

Q. Why did you come to the office?
A. They called me inside and asked my when I met him. That's all.

Q. Who came with you to the office?
A. ANGELO.

Q. Who else was here with you when you were being interviewed?
A. STEVE.

Q. Was the lawyer here also?
A. I don't remember.

Q. What did you tell the officer about STEVE?
A. ANGELO told me that we met in October and that we got married after.

Q. Did he tell you to tell the Immigration officer how you got married and where?
A. No.

Q. Did the Immigration officer ask him any questions?
A. I don't remember.

Q & A Statement of FREDESWINDA CAMACHO, File No. A13 942 820

Q. During these visits that STEVE made to your apartment, did he ever stay overnight?
A. He stayed there one night.

Q. Where did he sleep?
A. He slept in bed and I slept in the parlor.

Q. Did heever ask you to live with him?
A. No.

Q. Did you ever have marital relations with him?
A. No.

Q. After you came to the Immigration office, did you ever see COLLAZO after that?
A. No.

Q. Did STEVE tell you that he would be receiving your papers and letters from the Immigration office at your address?
A. I think so.

Q. Did you ever receive any?
A. No.

Q. Do you remember where STEVE was living at the time he got married?
A. No.

Q. When did you first learn of the divorce you could obtain?
A. It was in the summer he went to my sister's home and he spoke to me about the divorce and I wanted it.

Q. Do you know what summer?
A. 67.

Q. You want to have a divorce?
A. Yes.

Q. Did he say when he was going to make all the arrangements for the divorce?
A. Yes.

Q. And when did you receive the divorce decree?
A. He took it to my sister's house.

Q. Is it true that you were never in love with STEVE ZAOUTIS?
A. It's true.

Q & A Statement of FREDESWINDA CAMACHO, File No. A13 942 820

Q. Is it true that the marriage you went through with STEVE was solcy for him to remain in the United States and that you would get some financial consideration?
A. I really don't remember why we got married all I know is that we had gotten married.

Q. Have you ever been arrested before?
A. Yes.

Q. When was that?
A. I don't remember.

Q. How many times were you arrested.
A. Twice.

Q. Were you convicted
A. No.

Q. What were you arrested for?
A. The first time a friend of mine had some pills which she got froma nurse at a hospital and the police picked her up because the prescription was a false one. I was with her.

Q. What was the second time?
A. I shot myself.

Q. Why did you do that?
A. I don't know why.

Q. Where did you shoot yourself?
A. In the arm.

Q. Would you be willing to testify to the statements that you made today in an administrative proceeding before this Service?
A. Yes.

Q. What is your address?
A. 335 West 19th Street, apt. C-1.

Q. Are you married now?
A. No.

Q. Do you have any children?
A. Yes.

Q. How many?
A. One.

Q & A Statement of FREDESWINDA CAMACHO, File No. A13 982 820

ATTORNLY BIERVLIET TO RESPONDENT:

Q. When you received the $350.00 from MR. COLLAZO and you agreed to marry MR. ZAOUTIS, did you know you were doing anything wrong?
A. No. I didn't know I did.

INVESTIGATOR WHELAN TO RESPONDENT:

I
Q. I am showing you a photostatic copy of an affidavit of License to Marry. Would you identify the signature on that side of the brides as yours
A. Yes.

Q. Will you please sign the stenographer's notes to indicate your presence here today and later we will have them typed up. We can go over them and correct them and you can sign it.
A. Only to indicatemy presence. (complies)

I HEREBY CERTIFY that the foregoing statement consisting of eleven (11) typewritten pages is a true and accurate transcript of the notes taken by me in this matter on February 24, 1970.

Linda Wallace
Stenographer

Exhibit D Notice of Intention, dated May 20, 1970.

See pages A31-32, supra.

A 169

A13 942 820 INV-F-SS
September 9, 1970

re: STEFANOS ZACUTIS

As arranged, the subject appeared (with his attorney, Nicholas Altomerianos) before ARTHUR WINOKER, Assistant Counsel, Co-ordinating Committee on Discipline, 37 West 43rd St., New York, N.Y., today, in connection with their investigation into the alleged professional misconduct of Attorney PETER K. TIMON (A6 622 757).

Mr. WINOKER advised the undersigned that in his opinion, the subject was cooperative to his satisfaction and that he may be used as a witness against TIMON. It was Mr. WINOKER's guess that the case against TIMON might be completed by the end of December 1970. He requested this Service, if feasible, to hold in abeyance the pending rescission proceedings against the subject until the completion of the TIMON matter before its body.

Copy of this memorandum is being placed in TIMON's file, as well as in subject's file.

Samuel Steckler, Inv.-Frauds

Exhibit F Transcript of hearing before Immigration Judge Mack on June 2, 1971 and April 10, 1972.

See pages A34-62, supra.

A 171

6/72

LAW OFFICES
TACHNA, BAUMAN, ASARCH & ALTOMERIANOS
1290 AVENUE OF THE AMERICAS
ROCKEFELLER CENTER, NEW YORK 10019

(212) 582-1616

MAX TACHNA OF COUNSEL
BENJAMIN ASARCH
NICHOLAS PAUL ALTOMERIANOS

PAUL BAUMAN (1938-1968)
LEWIS A. PINKUSSOHN (1931-1956)

June 9, 1972

Immigration & Naturalization Service
20 West Broadway
New York, New York 10007

Re: Stefanos ZAOUTIS
A13 942 820

Gentlemen:

The hearing for the above named alien is scheduled for June 22, 1972, having been adjourned from April 10, 1972.

I respectfully request an adjournment of this matter until some time in September in view of the following reason. The alien Stefanos Zaoutis, as your file indicates, has remarried, and his wife is in Greece. She just recently gave birth to their third child. He is presently with her, since she is very sick, due to the childbirth. She has asked that he not leave her at this particular time, and I respectfully request on humanitarian grounds that this case be put over until some time in September, 1972.

Very truly yours,

Nicholas Paul Altomerianos

NICHOLAS PAUL ALTOMERIANOS

NPA/jt

Exhibit H Transcript of hearing before Immigration Judge Mack on October 2, 1972.

See pages A63-75, supra.

Exhibit I Transcript of hearing before Immigration Judge Mack on February 7, 1973.

See pages A76-78, supra.

Exhibit J Decision of Immigration Judge Mack, dated October 15, 1973.

See pages A79-A85, supra.

A 175

BEST COPY AVAILABLE

NOTICE OF APPEAL TO THE BOARD OF IMMIGRATION APPEALS

SUBMIT IN TRIPLICATE TO:

IMMIGRATION AND NATURALIZATION SERVICE

Fee stamp

In the Matter of:

STEFANOS MAGOUIS

File No. A13 942 [illegible]

1. I hereby appeal to the Board of Immigration Appeals from the decision, dated X [illegible] 25, 1973 in the above entitled case.

2. Briefly, state reasons for this appeal.

1. The proceeding should have been terminated on the ground that the action was barred by the statute of limitation.

2. The conclusion reached by the Special Inquiry Officer is not supported by clear, convincing and unequivocal evidence, based on the evidence in the record.

3. I (do) (do not) desire oral argument before the Board of Immigration Appeals in Washington, D. C.

4. I (will) (will not) be filing a separate written brief or statement. Brief will be filed one week prior to oral argument.

Signature of Applicant or Attorney or representative

ASARCH & KOUMARIANOS, P.C.

(Print or type name)

October 23, 1973

Date

1290 Ave. of Americas, N.Y.C. 1001[illegible]

Address (Number, Street, City, State, Zip Code)

IMPORTANT: SEE INSTRUCTIONS ON REVERSE SIDE OF THIS NOTICE

Form I-[illegible]A
(Rev. [illegible])

A 176

BEFORE THE BOARD OF IMMIGRATION APPEALS

Oral Argument: Jan. 21, 1974

In Re: STEFANOS ZAOUTIS

File: A-13942820

Board: Mr. Roberts, Miss Wilson and Mr. Torrington

Heard: For Respondent: Nicholas P. Altomerianos, Attorney
1290 Avenue of the Americas
New York, New York 10019

For Immigration Service: Irving A. Appleman,
Appellate Trial Attorney

Request: Termination

Chairman: You are asking us to recede from what we stated in our published decision in the Singh case which has been sustained by the 9th Circuit and certiorari was denied?

Attorney: I do.

Chairman: We will hear from you then.

Attorney: Since the Board, I think, is aware of what I am asking, I would like to point out in the decision of that case, the Singh case, the court was aware of the question as to whether or not under the Quintana v. Holland case the mere serving of that notice was just a means by which the District Director could initiate a proceeding and then perhaps seek his own good time in gathering together evidence by which to sustain allegations in the notice.

The court points out in their decision the distinction. I have a copy of the decision, but I don't know whether I can refer to it freely, I think I have put a copy in, copies of the court decision itself I believe, it will be the last xerox.

A 177

Chairman: There is a copy of the Singh opinion in the 9th Circuit.

Attorney: Yes, on Page 5 it says: "Therefore the court in Quintana had to reckon with the distinct possibility that a district director, acting on the basis of mere suspicion, might toll Section 246(a) by service of a notice of intent to rescind and then delay the prosecution of the rescission proceedings so that his staff could complete its investigation---a possibility that would defeat the very purpose of a statute of limitations."

The court goes on to talk about regulations which have alleviated the particular problem. Our contention is this, first the regulations are no substitute for statutory language. It is our opinion, even though the Circuit Court and the Board previously have not at least agreed with us, but the statute talks about some obvious act which must occur within 5 years, and we read it as meaning a determination, a finding.

Chairman: By whom?

Attorney: Our opinion, and I say a special inquiry officer, because he is the initial determiner of the question. It can be argued as it has been in the courts, it must mean when an appeal could go to the Board and this and that and counsel will argue thereafter, but since the statute is vague, I feel it is vague, and there is no enlightening Congressional interpretation

to help it, that we have to somewhere along the line pick something, and I am saying "to the satisfaction of the Attorney General" it says, well since that duty has been delegated to the special inquiry officer for determination, I am saying he is the one who must make a decision within the 5 years.

The reason I say this, in our case we had a notice received prior to the 5 years, we had an answer which we filed prior to the 5 years, and a request for a hearing prior to the 5 years. Nonetheless everybody disregarded our requests and we had no hearing until almost one year later, which was approximately 10 months after the 5-year period ended.

What was the Service doing all that time? The question is an alien cannot wait forever, in our case we waited even a year after the initial.....

Chairman: How were you prejudiced by the waiting?

Attorney: I will be honest.....

Chairman: I hope you <u>will</u> be honest.

Attorney: In our case.....

Chairman: I mean as a matter of law.

Attorney: Because the statute provides in our opinion a certain deadline for a determination.

Chairman: That is rather circular reasoning. It is a sort of bootstrap approach.

A 179

Attorney: Not as to the statute and.....

Chairman: You say you were prejudiced because the statute was not complied with. What I am saying is, I am asking you <u>how</u> you were prejudiced? In your preparation for the hearing?

Attorney: I am not saying in preparation for the hearing. To be prejudiced doesn't necessarily mean for the particular hearing. I think every alien has the right to at least have an idea as to whether or not some decision in a particular case will be made, based on allegations.

Now this particular alien, or other aliens subsequent to our case, might have either marriages or remarriages or children or something, and their entire life is held in abeyance without knowing at what point some day the District Director or the special inquiry officer will get into the case.

In our instance the case is now almost 4 years late, June will be 4 years, it has gone on and on. I feel that the statute, if it is unclear and indefinite, is being interpreted in a way which allows the Service to choose any date prior to the 5 years just to serve notice where they might not even have any particular substantiating evidence, and allow it to drag on indefinitely, so that some day they <u>might</u> find evidence in a particular case.

A 180

It is my opinion, I think there might be as many cases where they do find basis for rescission, as where a special inquiry officer, after evidence, has found that there was no basis for rescission. So I say those have to be equalled out, and I also say since the statute is not interpretative, I didn't write it, it is there, I believe the District Court, not the Court of Appeals, was the proper finder of the conclusion.

It is our opinion, we believe that even though we have a decision in the Court of Appeals in the 9th Circuit, the particular debilitating factor they were trying to avoid was letting the case just hang, that has to be avoided. There has to be some firm basis whereby aliens against whom a rescissionproceeding will be brought, which means if they are found to have committed the act which caused rescission, will lose residence, should have a firmer and more definitive idea as to when in fact the 5 years is up.

It is our opinion as attorneys for this particular alien, that the 5-year period should be not only a notice to serve, but a decision by the special inquiry officer, on the facts adduced at a hearing.

That is our legal opinion and we are requesting the Board to recede from its decision and reverse itself.

A 181

Chairman: Actually if we are to follow your reasoning that an alien is entitled to know one way or another with finality where he stands, even if the Immigration Judge makes his decision just within the 5-year period, as you know, an appeal to this Board takes some time, and after that judicial review in the courts takes some time. The Singh case illustrates the fact that when you litigate, especially these days, it takes time. I am just wondering, because we carefully thought out that decision in Singh, before we reversed the Immigration Judge. It would have been a lot easier for us to take his approach, but we analogized the bringing of the proceedings by the District Director to the typical statute of limitations situation, and we were sustained in that approach by the Court of Appeals.

In other words the "satisfaction of the Attorney General" consisted of the District Director being satisfied that there was probable cause to proceed, and he started action, and it is that action which must come within the 5-year period.

Attorney: My only argument to that is I don't feel the statute sets forth that interpretation because it will not be in effect the District Director in finality who will make the decision that he is satisfied the alien's residence should in fact be rescinded.

The interpretation of those words, again it is not, it might just be, between us, faulty draftsmanship of the statute, it might be unclear because it was not automatic when prepared and written. I say since it

A 182

specifically says "to the satisfaction of the Attorney General," regarding what? That his residence be rescinded. Since the District Director will not make that decision, then he cannot be the one that can be chosen as the point of the 5-year cut-off by serving of notice; that is why I picked the special inquiry officer. Because either the Board will sustain him, or will reverse him. But the thing is that the decision is made by the special inquiry officer within the 5-year period, and that is our argument.

Chairman: And you might have better luck in the 2d Circuit.

Attorney: Agreed.

Mr. Appleman: It is all grounds that we argued and went over at a great deal of length in Singh and other cases. Frankly, I see no need to take the time of the Board to rehash those arguments; unless there is some particular point you want me to address myself to, I will rest on the record.

Attorney: I don't want the Board to feel I am trying to take up time on a moot point. It is just that our case in fact was pending for many years prior to the actual decision of Singh in the Court of Appeals, and in fact the special inquiry officer was waiting for that decision to make his decision. Therefore in a sense had the special inquiry officer on his own initiative made a decision years ago, we might not be here today, and might be in the court litigating it simultaneously with the other case in California, which is what I had hoped, because I have been corresponding

A 18.3

with Mr. Hertogs. But he didn't feel he wanted to take it on his own initiative and decide one way or the other, so I apologize, I wald rather not have been here now, but years ago.

Chairman: You don't have any apology to make. After all the mere denial of certiorari by the Supreme Court is not definitive. You don't have to accept our position or that of the 9th Circuit if you want to litigate in your own Circuit. But you must realize of course, we thought it out very carefully before we reached the conclusion we did in Matter of Singh.

Attorney: I appreciate that and understand it.

Chairman: If there is anything you want to say on the merits, because thus far you merely discussed the statute of limitations.....

Attorney: No, I think this particular case can resolve itself one way or the other on the question of this law. I don't want to go into anything further. In fact we did not even question or cross-examine testimony of the witnesses in this case. There were many other items aside from the actual merits of the case which were involved in this case, which again might not be within the jurisdiction of the Board, and I would rather not bring it up at this particular time. I would rather rely on what we have done, and that is it.

A 184

Chairman: You realize of course, if you lose on your legal issue, you won't have another opportunity to challenge the.....

Attorney: Yes I understand that. We haven't challenged the evidence presented, and are not raising the question here before the Board.

Chairman: We will take this under advisement.

Attorney: Thank you.

mb

Exhibit M Decision of Board of Immigration Appeals, dated May 2, 1974.

See pages A86-87, supra

THB:ml
75-2021

A-186

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

STEFANOS ZACOUTIS,

Plaintiff,

- v -

MAURICE F. KILEY, as District Director for the Immigration and Naturalization Service, and the IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

: 75 Civ. 2783 (IBW)

- x

MEMORANDUM OF LAW IN DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

This is an action seeking to reverse the decisions of the Immigration Judge and the Board of Immigration Appeals which rescinded the plaintiff's status as lawful permanent resident, pursuant to Section 246(a) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1256(a).

BEST COPY AVAILABLE

A - 187

Plaintiff's status was rescinded because the facts revealed that he was not eligible for adjustment of status to that of lawful permanent resident, pursuant to Section 245 of the Act, 8 U.S.C. §1255, since his marriage to a United States citizen was a sham entered into solely for immigration purposes.

Plaintiff contends that the rescission of his status as lawful permanent resident was improper because it was barred by the statute of limitations and moves for summary judgment. The Government, on the other hand, contends that the rescission proceeding was properly brought within the five-year period provided by law and also moves for summary judgment.

STATEMENT OF THE FACTS

The facts in this case have been set forth with particularity in both the Rule 9(g) statement and in the accompanying affidavit of Thomas H. Belote, Special Assistant United States Attorney. They may be summarized as follows:

TMS:ml
75-2021

A 188

The plaintiff, a native and citizen of Greece, entered the United States on November 6, 1963 as a non-immigrant employee of a foreign government. On January 10, 1965 he went through a marriage ceremony with Fredeswinda Camacho, a United States citizen. On the basis of this marriage, plaintiff applied for adjustment of status to that of lawful permanent resident under Section 245 of the Act, 8 U.S.C. §1255. The plaintiff's application was granted by the Immigration and Naturalization Service (the "Service") on August 25, 1965. Thereafter an investigation revealed that the marriage had been arranged solely to enable plaintiff to obtain nonquota status under the immigration laws, that he had never resided with his citizen wife nor intended to enter into a bona fide marital relationship with her, and that money had been paid as consideration to the wife for entering the marriage. Accordingly, the Service instituted rescission proceedings pursuant to 8 C.F.R. 246.1 by mailing a notice of intent to rescind adjustment of status to plaintiff on May 20, 1970. Hearings were held

before an Immigration Judge, who on October 15, 1973 rescinded plaintiff's status as lawful permanent resident on the basis of clear, convincing and unequivocal evidence of plaintiff's ineligibility at the time of adjustment. The Board of Immigration Appeals affirmed on May 2, 1974. This litigation followed.

ISSUES PRESENTED

Whether the five-year limitation period in Section 246(a) of the Immigration and Nationality Act, 8 U.S.C. 1256(a), for rescission of an alien's adjustment of status to permanent residence is tolled when the District Director commences independent adversary proceedings by service of a notice on the alien of an intention to rescind his permanent resident status.

RELEVANT STATUTE

Section 246 of the Immigration and Nationality Act, 8 U.S.C. §1256

> (a)...If, at any time within five years after the status of a person has been

A-190

otherwise adjusted under the provisions of section 245 or 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling deportation in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made.

RELEVANT REGULATION

8 C.F.R. §§246 (1970).

§246.1 Notice - If it appears to a district director that a person residing in his district was not in fact eligible for the adjustment of status made in his case, a proceeding shall be commenced by the service upon such person of a notice of intention to rescind which shall inform him of the allegations upon which it is intended to rescind the adjustment of his status. In such a proceeding the person shall be known as the respondent. The notice shall also inform the respondent that he may submit, within thirty days from the date of service of the notice, an answer in writing under oath setting forth reasons why such rescission shall not be made, and that he may, within such period, request a hearing before a special inquiry officer in support, of or in

A-191

lieu of his written answer. The respondent shall further be informed that he may have the assistance of or be represented by counsel or representative of his choice qualified under Part 292 of this chapter, without expense to the Government, in the preparation of his answer or in connection with his hearing, and that he may present such evidence in his behalf as may be relevant to the recission. [28 F.R. 6737, June 29, 1963]

§246.3 Allegations contested or denied; hearing requested. - If, within the prescribed time following service of the notice pursuant to §246.1, the respondent has filed an answer which contests or denies any allegation in the notice, or a hearing is requested, a hearing pursuant to §246.5 shall be conducted by a special inquiry officer and the procedures specified in §§242.10, 242.11, 244.12, 242.13, 242.14(c), (d), and (e), and 242.15 of this chapter shall apply. [29 F.R. 13243, Sept. 24, 1964]

§246.4 Special inquiry officer's authority; withdrawal and substitution - In any proceeding conducted under this part, the special inquiry officer shall have authority to interrogate, examine, and cross-examine the respondent and other witnesses, to present and receive evidence, to determine whether adjustment of status shall be rescinded, to make decisions thereon, including an appropriate order, and to take any other action consistent with applicable provisions of law and regulations as may be appropriate to the disposition of the case. Nothing contained in this part shall be construed to diminish the authority conferred on special inquiry officers by the Act...

A 192

§246.5 Hearing. - (a) Trial Attorney. The Government shall be represented at the hearing by a trial attorney who shall have authority to present evidence, and to interrogate, examine, and cross-examine the respondent and other witnesses. The trial attorney is authorized to appeal from a decision of the special inquiry officer pursuant to §246.7 and to move for reopening or reconsideration pursuant to §246.8.

ARGUMENT

THE RESCISSION OF PLAINTIFF'S STATUS AS LAWFUL PERMANENT RESIDENT, COMMENCED WITHIN FIVE YEARS OF ITS GRANTING BY SERVICE OF A NOTICE OF INTENTION TO RESCIND, WAS NOT BARRED BY STATUTE OF LIMITATIONS.

The Government strongly contends that service of a "Notice of Intention to Rescind Adjustment of Status" issued by the District Director commending an independent adversary proceeding before an administrative tribunal tolls the applicable five-year statute of limitations under Section 246(a) of the Act, 8 U.S.C. 1256(a). Its position is supported by the recent decision of Singh v. Immigration and Naturalization Service, 456 F.2d 1092 (9th Cir.), cert. denied 409 U.S. 847 (1972), involving

A-193

the same issue which is now before this Court. That case held that a notice of intention to rescind adjustment of an alien's status was sufficient to toll the statute of limitations and it was not necessary that a hearing before an Immigration Judge and a decision by him be made within the five-year limitation period of Section 246(a).

A notice of intention to rescind, an instrument analogous to a criminal information or indictment, is issued by the District Director, the prosecuting authority, pursuant to 8 C.F.R. §246.1. Service of this notice is the formal point in commencement of a rescission proceeding involving a trial type of adversary hearing. 8 C.F.R. 246.5. From the time the notice is served, the course of events is completely out of the District Director's control. The alien may request a hearing before an Immigration Judge. 8 C.F.R. 246.1 and 246.3. The Immigration Judge under present regulations is an administrative judge who, in addition to independently

A 194

adjudicating the truth of the charges, controls delays, continuances and procedural matters as required to facilitate a full and fair hearing. 8 C.F.R. 246.4 - 246.6. See Singh, supra at 1096.*

As pointed out by the Court in Singh:

> "While prosecutorial duties are still delegated to the district director, the responsibility for deciding whether rescission is appropriate lies solely with an independent (Immigration Judge). If a district director tells the running of the statute, he cannot prolong the proceedings indefinitely while his staff searches for evidence to support its suspicions. The (Immigration Judge) controls the pace of a lawsuit; he can, as a result, prevent any undue delay that would prejudice the rights of the alien whose adjustment of status is under challenge" Supra, at 1096.

---

*The distinction between the prosecutorial functions of the District Directors and the quasi-judicial duties of the Immigration Judges in Section 246 of the Act, 8 U.S.C. §1256 is consistent with those other provisions of the Act, Title 8, United States Code which relate to expulsion proceedings. See Matter of Merced, Interim Decision 2273 (B.I.A. 1974); Matter of Gallares, Interim Decision 2177 (B.I.A. 1972); Matter of Geronimo, 13 I.& N Decisions 680 (B.I.A. 1971).

A 195

The broad purposes of all statutes of limitations would not be served by allowing the statute to run in a case such as the instant one. Such limitation periods are designed to promote justice and prevent the prejudice to a defending party that would arise as a result of instituting stale claims with their accompanying elements of surprise, since, under such circumstances, "evidence has been lost, memories have faded and witnesses have disappeared." American Pipe and Construction Co. v. Utah, 414 U.S. 538, 554 (1974), quoting Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49. Applying this reasoning to the instant case, not only has the petitioner been unable to demonstrate that he has suffered any prejudice, when that question was asked of him on oral argument before the Board he implicitly acknowledged that the absence of prejudice in the case. Furthermore, the timely notice of intent eliminated any element of surprise in this matter. All the necessary witnesses and evidence were available* and the transcript of the proceedings

*We note in this respect that the alien declined to cross-examine the witnesses produced by the Service Trial Atter-

demonstrates that memories had not faded. Although the alien appeared to suffer a self-serving and extreme lapse of memory as to the circumstances of his "marriage", he was the only one to be so afflicted, in marked contrast to the clarity of memory of the other witnesses to the event.

In this context, there is no sound reason in law or policy for not tolling the statute of limitations upon formal commencement of proceedings. Indeed, settled policy reasons point the other way. It is settled that statutes of limitations sought to be applied to bar rights of the Government must receive a strict construction in favor of the Government and this construction takes on particular force under a time limitation erecting an absolute bar. See Independent Coal & Coke Co. v.

---

*ney and despite his representations to the Immigration Judge at the being of these hearings the alien declined to present his evidence at the reconvened hearing on February 7, 1973. Under these circumstances it is understandable that the alien's attorney was unable to demonstrate any prejudice when queried by the Board of Immigration Appeals.

United States, 274 U.S. 640, 650 (1927); E. I. Dupont de Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924); United States v. Whited & Wheless, Ltd., 246 U.S. 552, 561 (1918); United States v. St. Paul, Minneapolis & Manitoba Railway, 247 U.S. 310, 314 (1918).

Moreover, where the proceeding is the kind, as here, legitimately bound in by procedural safeguards designed to move at a deliberate speed, a requirement of unreasonable speed would have a deleterious effect both upon the defending party and upon the ability of the United States to protect its interests. See United States v. Ewell, supra, 383 U.S. at 120. Requiring a hearing under pressure of time puts a premium on the use of any and all means of delay and encourages hasty and otherwise drastic procedure detrimental to a complete hearing. Special inquiry officers might well be less diligent in protecting legitimate interests of the alien in such an atmosphere threatening an absolute bar to the Government's interest in enforcement of the immigration laws. Cf., United States v. Tateo, 377 U.S. 463, 466 (1964).

Furthermore, at no time between the alien's notice for a hearing pursuant to 8 C.F.R. §246.1 and the termination of the proceedings before the Immigration Judge did the alien demand that the proceedings move forward in a more expeditious manner than that which was determined by the Immigration Judge. In fact many of the delays or adjournments in the proceedings below were the result of alien's desires. It was Zaoutis who requested that the factfinding portion of the recission proceedings be held in abeyance until the Immigration Judge ruled on his statute of limitations motion. It was Zaoutis who requested an adjournment because he was in Greece with his second spouse. It was Zaoutis who requested that he be able to present his defense in one proceeding and then when the hearings were reconvened to afford him that opportunity he declined to present any evidence.

Construing §246(a) to permit the commencement of rescission proceedings to toll the statute of limitations is in line with ordinary criminal and civil statutes

A 199

of limitations, which provide that the filing of an indictment or of a civil complaint tolls the running of the statute. Singh v. Immigration and Naturalization Service, supra. It is also consistent with other immigration cases where the courts have looked to the initiation of proceedings against an alien rather than the conclusion of the process as the plaintiff suggests in this action. Therefore the courts have treated the proceedings as commenced either by the issuance of a warrant of arrest or at the latest by the service of the warrant. See United States ex rel. Nerisiades v. Shaughnessy, 187 F.2d 137 (2d Cir. 1951), aff'd, 342 U.S. 580 (1952).

Also, in Miller v. United States ex rel Hunt, 181 F.2d 363 (5th Cir. 1950) the question before the Court was whether a timely-issued warrant of arrest, as distinguished from a warrant of deportation, served to toll the running of the limitation provision as set forth in section 19(a) of the 1917 Act. In ruling that a timely issuance of the warrant of arrest sufficed, the Court noted:

A 200

> This position is warranted by the express phraseology of the statute and is rendered persuasive by consideration of the universal rule prevailing in the various state and federal courts, that the filing of charges, whether by information or by indictment, tolls the running of the statute of limitations against a criminal prosecution and is effective even though the warrant be not served upon the accused until after the running of the statute.

See also United States ex rel. David v. Tod, 289 F.60 (2d Cir. 1123); United States ex rel. Patton v. Tod, 297 F. 385 (2d Cir. 1924); United States ex rel. Ginal v. Day, 22 F.2d 1022 (2d Cir. 1927); Metaxis v. Weedin, 44 F.2d 539 (9th Cir. 1930); Marty v. Nagle, 44 F.2d 695 (9th Cir. 1930; Tillinghast v. Cresswell ex rel. DiPierro, 54 F.2d 459 (1st Cir. 1931); Raftery ex rel. Giacomazzi v. Tillinghast, 63 F.2d 97 (1st Cir. 1933); Bun Chew v. Connell, 233 F. 220 (9th Cir. 1916).

There is no basis for applying a different rule with regard to the limitation provision of Section 246 of the Act. "The function served by any statute of limitation is to give the accused notice of the assertion

A 201

of a claim against him before it has become stale, in order that he may be duly warned to preserve his evidence if he wishes to contest the asserted claim". Matter of Singh, 13 I & N Dec. 439, 443, citing D'Onofrio Construction Company v. Recon Company, 255 F.2d 904, 908 (1st Cir. 1958).

In this case the alien was duly warned, obtained counsel immediately, and had every opportunity to present his evidence in defense. The notice of intention to rescind, served upon the plaintiff by registered mail within the five-year period of limitation, fully sets forth the essential facts for commencement of rescission proceedings under section 246 of the Immigration and Nationality Act. Furthermore, it appears from a reading of the notice to rescind that there was probable cause for believing that the plaintiff had obtained his adjustment of status unlawfully. It has been held that where the foregoing factors are clearly set forth in a complaint served upon the accused, the service of the

A 202

complaint tolls the running of the statute of limitations, Jaben v. United States, 333 F.2d 535 (8th Cir. 1964), aff'd 381 U.S. 214 (1965).

POINT II

THE GOVERNMENT'S INTERPRETATION OF §246(a) OF THE ACT, THAT SERVICE BY A NOTICE OF INTENTION TO RESCIND TOLLS THE STATUTE OF LIMITATIONS, MUST BE GIVEN GREAT DEFERENCE BY THE COURTS.

Petitioner would have the Court adhere to his own interpretation of §246(a), that the statute requires a decision by the Immigration Judge within the five year period, rather than to the Service's interpretation, that service of a notice of intention to rescind suffices to toll the statute of limitations. However, it is well-established that the construction of a statute by the agency charged with its administration is to be given "great deference" by the courts. Udall v. Tallman, 380 U.S. 1, 16 (1965); Louisville and Nashville Railroad Co. v. U.S., 282 U.S. 740 (1931). This is particularly true when the administrative practice in question and

A 203

the agency's interpretation of the statute represents "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion..." Power Reactor Development Co. v. International Union of Electrical Workers, 367 U.S. 396, 408 (1961); Nagarene v. Attorney General of U.S. 512 F.2d 936 (D.D.C. 1975). Furthermore, it is of no import that the administrative interpretation of the statute is not the only reasonable one or even the one the court might have chosen in the first instance. Udall v. Tallman, supra. Great weight is especially accorded the fact that such has been the "uniform practice of the authorities charged with its administration..." Louisville and Nashville RR Co. v. United States, supra, at 757; Nagarene v. Attorney General, supra.

Not only is the contemporaneous construction of §246(a) by the Immigration and Naturalization Service, its implementing agency, an eminently reasonable one, it has been carried into practice uniformly by the Board of Immigration Appeals. Petitioner seems to allege that

A 204

the Service's interpretation is unreasonable as contrary to Congressional policy directed toward prevention of some sort of injury to the alien by barring his removal after five years. However, if Congressional concern was aimed at protection of the alien's rights, the Service's interpretation is more reasonable than that of petitioner. Concededly, §246(a) requires that some action be taken by the Attorney General or his delegate within five years after adjustment of status. However, construing this section to require a hearing and a decision on the merits within this five year period would tend to injure the alien's rights, rather than protect them, by encouraging a hasty adjudication of rescission cases in order to reach a decision before expiration of the five-year deadline. See Singh v. Immigration and Naturalization Service, supra.

Furthermore, under the plaintiff's construction of the statute and the regulations, once a notice of recission is sent and the alien knows that the District

A 205

Director intends to rescind the adjustment he could flee and frustrate the recission process. Alternatively, the alien could delay and extend the hearing process to frustrate recission. This would put a premium on the capacity of an alien to avoid arrest and defeat the purpose of the law. Congress could not have entertained this intention.

Petitioner also claims that the Government's interpretation of the statute is inconsistent with the Service's regulatory scheme in 8 C.F.R. §246.1, since that regulation does not specifically provide for a tolling of the statute of limitations, but merely describes the procedure to be followed by the district director in serving the notice. However, there is no requirement that the agency in charge of implementing an enabling statute spell out its interpretation of that statute in its regulation. That is clearly the function of the Board of Immigration Appeals under 8 C.F.R. §3.1 and accordingly the Board exercised that function in Matter of Singh, 13, I & N Dec. 439 (1969). The regulation does

A 206

provide that the proceeding to rescind the alien's status be commenced by service of a notice of intention to rescind. Thus, it is perfectly reasonable for the Board of Immigration Appeals to construe the statute and regulation together as providing for the tolling of the five year statute of limitations by commencement of the rescission proceedings through service of the notice. Again, such interpretation is not only legitimate but should be given deference by the courts; such deference is "even more clearly in order" in the case of construction of an administrative regulation than of a statute. Udall v. Tallman, supra.

Petitioner makes much of the language of the statute - "if, at any time within five years.... it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken..." 8 U.S.C. §1256(a) - contending that its own construction of this language is the sole

A 207

reasonable construction, particularly in light of the statutory use of the word "satisfaction". However, petitioner's analysis of what the statute mandates proves nothing. Clearly, the statute does not require that the rescission itself take place within the five-year period; the statutory clause setting forth the five-year limitation most logically modifies the subsequent clause "it shall appear to the satisfaction of the Attorney General". In the event, says the statute, that it appears to the Attorney General (or his delegates), within five years after adjustment of the alien's status, that the alien was not eligible for such adjustment, then must the Attorney General commence such action as is necessary to rescind the alien's status, which will eventually include a hearing conforming to the standards of due process and an independent adjudication by an administrative judge. It is inconceivable that Congress expected the entire rescission proceeding, including the agency's investigation, commencement of the action, filing of briefs, hearings, etc., culminating in adjudication of the case and a final decision to occur within

A 208

the five-year period. This is particularly true when the alien could easily be the source of delay in order to avoid the recission of his status. Furthermore, as here, where the evidence causing the initiation of the proceedings surfaces only at the end of the five-year period it is inconceivable that Congress intended to condone the alien's fraud by requiring that all recission proceedings be completed within the specified time.

Thus, the real issue before the court is the meaning of the statutory phrase "it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible", which event must occur within the five-year statutory limitation. Petitioner indulges in a semantical interpretation of this phrase, including a dictionary definition, in an attempt to prove that "appear to the satisfaction" can only mean a determination following a formal hearing and adjudication. There is simply no logical justification for such an expansive and all-inclusive interpretation of this phrase. Its common

A 209

sense meaning, not microscopically examined as an isolated phrase but read as part of the total statutory scheme, would be that the Attorney General must have some probable cause, based on an investigation of the circumstances, to believe that the alien was ineligible for adjustment of status. At that time, which event must occur within five years after adjustment of status, the District Director (the Attorney General's delegate under the regulations) must commence rescission proceedings against the alien. This is accomplished by serving the alien with a notice of intention to rescind. 8 C.F.R. §246.1. That is all the District Director can be expected to do within that five-year period, for after the point, the sequence of the proceedings is totally out of his control, and placed into the hands of the Immigration Judge. The case may then be heard and adjudicated immediately, or may be prolonged over a span of several years, as was the situation here, through no fault of either of the parties involved but due to the nature of the proceedings. This interpretation of the statute by the Service is in accord with

A 210

all similar statutes of limitations, which recognize that the nature of all civil and criminal proceedings necessitate occasional delays, and mandate only the commencement of the action by filing of the complaint or indictment.

Petitioner relies on Quintana v. Holland, 255 F.2d 161 (3d Cir. 1958), for support of his interpretation of the statute, but neglects to mention the rationale underlying the court's holding, which rationale is no longer applicable today, as discussed by the Ninth Circuit in Singh v. Immigration and Naturalization Service, supra. It is true, as petitioner describes in a lengthy discussion of the case, that Quintana held that the service of notice within the five-year period is insufficient to toll the statute. However, immediately subsequent to announcing this holding, the Third Circuit described its reasons for making such a decision. At the time Quintana was decided, the regulations then in effect provided that not only did the District Director initiate the rescission proceedings, he also decided the outcome of these proceedings.

A 211

8 C.F.R. §246.12(b) (1954). Thus, a potential danger existed that the District Director might abuse these powers, instituting rescission proceedings by service of a notice of intent and thereby tolling §246(a), and then delaying prosecution of the proceedings until such time as he completed his investigation and accumulated enough evidence to warrant rescission. Such abusive conduct, noted the Ninth Circuit in Singh, "would defeat the very purpose of a statute of limitations", supra at 1095. Believing that such was the situation in Quintana, the court there concluded, "as of that time [the end of the five-year period] the only investigation had concluded negatively and the Service was engaged in seeking further evidence with which to convince an inquiry officer that the plaintiff had improperly secured his status". Supra at 164. However, this potential abuse no longer exists today, therefore making the rationale underlying the holding in Quintana inapplicable. As noted by the court in Singh, the situation has been drastically changed by the change in regulation. Today, while the District Director still commences the proceedings by service of

A 212

the notice, and still performs the prosecutional functions, the adjudicatory functions are performed by a completely independent administrative judge, the Immigration Judge (formerly, the Special Inquiry Officer), 8 C.F.R. §242.8(a), who also controls the pace of the proceedings, 8 C.F.R. §242.13, as well as all other procedural matters. Thus, the ability to prolong the proceedings has been removed from the district director, thereby extinguishing the rationale for the Third Circuit's and petitioner's all-encompassing construction of the statute. See Singh v. Immigration and Naturalization Service, supra at 1094-96.

Perhaps in acknowledgement of his failure to make a convincing argument for his interpretation of §246(a), petitioner attempts to show Congressional ratification of Quintana's reading of the statute by Congress' failure to subsequently amend the statute to conform to the Service's point of view. Such an after-the-fact, absence of affirmative conduct argument proves too much, for it can similarly be applied to Congress'

A 213

failure to amend the statute to conform to petitioner's interpretation following the Singh decision, which held that service of a notice of intention to rescind suffices to tell the statute. Thus, in the absence of legislative history to expressly inform us of Congressional intent, Singh, supra at 1095 n. 8, a common sense interpretation of the statutory language plus examination of analogous legislation must be relied upon to arrive at an acceptable construction of the statute. The Service submits that its own interpretation of §246(a) is not only acceptable but also the most reasonable. However, even if both interpretations are equally reasonable, the Board's interpretation should be accepted by the courts, which interpretation and practice "will not be disturbed except for cogent reasons". Louisville and Nashville RR Co. v. United States, supra; Udall v. Tillman, supra; Nazareno v. Attorney General, supra. Petitioner has shown no such cogent reason for causing the Service's interpretation to be overturned.

A 214

POINT III

THE DISTRICT DIRECTOR'S AUTHORITY TO INITIATE RESCISSION PROCEEDINGS IS NOT VOID FOR VAGUENESS AND WAS PROPERLY EXERCISED WHEN THERE APPEARED TO BE PROBABLE CAUSE FOR RESCISSION

Plaintiff's argument that the Attorney General's grant of authority to the District Director to initiate rescission proceedings is void for vagueness or failure to set out proper standards for the action of the District Director is totally without merit. The statute specifies that if it shall appear to the satisfaction of the Attorney General that the alien was not in fact eligible for adjustment of status, the Attorney General shall rescind it. Section 246(a), 8 U.S.C. §1256(a). The underlying regulation provides that if it appears to a district director that the alien residing in his district was not eligible for the adjustment of status made in his case, he shall commence a proceeding to rescind it. 8 C.F.R. 246.1.

It is beyond dispute that a marriage contracted solely to circumvent the immigration laws with no

A 215

intention that the parties will ever live together as husband and wife does not suffice to confer upon the alien the status of "spouse" of a United States citizen. Lutwak v. United States, 344 U.S. 604 (1953); Scott v. Immigration and Naturalization Service, 350 F.2d 279 (2d Cir. 1965), reversed on other grounds sub nom. Immigration and Naturalization Service v. Errico, 385 U.S. 214 (1966); Bark v. Immigration and Naturalization Service, 504 F.2d 1030 (9th Cir. 1974); Kokkinis v. District Director, 429 F.2d 938 (2d Cir. 1970). Adjustment of status obtained means of a fraudulent marriage can be rescinded. Yaldo v. Immigration and Naturalization Service, 424 F.2d 501 (6th Cir. 1970). Thus, if the plaintiff entered into a sham marriage he would not have been eligible for adjustment of status at the time it was granted.

An investigation by the Service revealed that plaintiff divorced his wife in Chihuahua, Mexico, on April 5, 1967, less than two years after his adjustment of status occurred. On February 24, 1970 the plaintiff's

A 216

former wife, Fredeswinda Camacho, admitted in a sworn statement to the Service that her marriage to the plaintiff had been a sham arranged by a third party for which she received the sum of $350., that she never resided with the plaintiff as his wife and that she never had any marital relations with him. A witness to the plaintiff's marriage was Angelo Collazo, a known marriage arranger. Furthermore, the Service had received information from the alien's former counsel which indicated that the marriage was a sham. Finally, the Service apparently received the cooperation of Angelo Collazo himself prior to serving the alien with its notice of intent to rescind.

POINT IV

THE DECISION OF THE IMMIGRATION JUDGE WAS SUPPORTED BY CLEAR, CONVINCING AND UNEQUIVOCAL EVIDENCE.

In reviewing immigration orders the courts have always insisted that their role is a limited one,

A 217

devoted to a determination of whether the administrative authorities have acted in conformity with law and the Constitution. Vajtauer v. Commissioner, 273 U.S. 103 (1927). Courts will not interfere with administrative determinations unless, upon the record, the proceedings were manifestly unfair, or substantial evidence to support the administrative findings is lacking, or error of law has been committed, or the evidence reflects a manifest abuse of discretion. Kessler v. Strecker, 307 U.S. 22 (1939); Rongetti v. Neelly, 207 F.2d 281 (7th Cir. 1953); Shung v. Murff, 176 F. Supp. 253 (S.D.N.Y. 1959), aff'd per curiam 274 F.2d 667 (2d Cir. 1960). Resort to the declaratory review procedure does not enlarge the permissible scope of review traditionally permitted in exclusion or deportation cases. Brownell v. Shung, 352 U.S. 180 (1956).

The generally stated rule is that the court will not conduct a de novo hearing on matters which were or should have been considered in the administrative proceeding. Kessler v. Strecker, supra; Kokkinis v.

A 218

District Director, supra. The function of the reviewing court is to determine whether the administrative order is validly supported by the record of the proceedings, and in the absence of any showing of unfairness or illegality in the administrative record there is no basis for judicial intervention. Chung v. Murff, supra.

A review of the entire record discloses that both the Immigration Judge and the Board of Immigration Appeals employed the proper standard of clear, convincing, and unequivocal evidence mandated by Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966), and applicable to rescission proceedings. Wazini v. Immigration and Naturalization Service, 392 F.2d 55 (9th Cir. 1968). The evidence consisted solely of testimony by three witnesses. The plaintiff testified that he did not remember when he met his wife, or how many times he saw her, how soon they were married, or the date of the marriage. He stated that he picked her up at the World's Fair, but later, when asked whether anyone had introduced her to him, he contradicted himself by saying that he

A 219

did not remember. His testimony regarding the time he stopped living and working at the Greek Consulate was also confused. In contrast there is the testimony of Angelo Collazo, a self-styled "counsellor on marriages" whose duty was to find American women to marry aliens. He testified that he obtained Fredeswinda Camacho to marry an alien he identified as the plaintiff, that the arrangement stipulated that the parties were not to live together and were to get a quick divorce within a year, and that he paid the citizen wife between three and four hundred dollars for this marriage. Fredeswinda Camacho's testimony corroborated that of Angelo Collazo at every point; in addition, she stated that the plaintiff never lived with her and that she never had sexual relations with him. The clear, straightforward testimony of the two Government witnesses stands in marked contrast to the uncertain and confused testimony of the plaintiff, and was obviously deserving of the Immigration Judge's belief.

The Immigration Judge had the opportunity to observe the demeanor of the witnesses and cited per-

A220

suasive reasons for his findings to which the reviewing court must accord great weight. Kokkinis v. District Director, supra; Yaldo v. Immigration and Naturalization Service, supra. The testimony adduced at the rescission hearing firmly supports the Immigration Judge's finding that the plaintiff's marriage was a sham and constitutes clear, convincing and unequivocal grounds for rescission of status as a permanent resident.

CONCLUSION

It is submitted that the Board of Immigration Appeals properly affirmed the decision of the Immigration Judge, rescinding the adjustment of status granted to the alien on August 25, 1965 pursuant to 8 U.S.C. §1256. The defendants therefore respectfully submit that their motion for summary judgment should be granted and that the action be dismissed in all respects.

Dated: New York, New York

July 26, 1976

THB:ml
75-2021

A 221

Respectfully submitted,

ROBERT B. FISKE, Jr.,
United States Attorney for the
Southern District of New York,
Attorney for Defendants.

THOMAS H. BELOTE,
Special Assistant United States Attorney
Of Counsel.

A 222

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

STEFANOS ZAOUTIS,

75 Civ. 2783 (IBW)

Plaintiff,

-against-

MAURICE F. KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and the IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

----------x

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

The United States Attorney argues that current administrative practices provide insight to Congressional intent in enacting legislation in 1952. Actually, three arguments are advanced in opposition to the plaintiff's motion for summary judgment, and in support of the Government's "cross-motion".

Initially, the Government argues that the Notice of Intention to Rescind is analogous to a criminal information or indictment (GM8)*. The second argument advanced by the Government is that the adjudication of rescission by a Special Inquiry Officer eliminates the rationale set forth in the Third Circuit's decision in Quintana v. Holland, 255 F.2d 161 (3rd Cir. 1958) and as a corollary the Government appears to argue that the presence of a Special Inquiry Officer will prevent any abuses that might spring from its interpretation of the statute.

Finally, the Government advances two fairly tired and inappropriate policy arguments for the adoption of its version of the statute. Thus, the Government argues that the statute in question "must receive a strict construction in favor of the Government and this construction takes on a particular force under a time limitation erecting an absolute bar." (GM11) The second policy or construction argument advanced by the Government is simply that "it is well established that the construction of statute by the agency charged with administration is to be given 'great deference' by the courts". (GM17)

*Reference to "GM" are to the pages of the memorandum submitted by the United States Attorney in support of its cross-motion for summary judgment. References to "PM" are to the pages of the plaintiff's memorandum in support of his motion for summary judgment.

ARGUMENT

THE PLAINTIFF SHOULD HAVE SUMMARY JUDGMENT BECAUSE STATUTE MANDATES A CLEAR POLICY WHICH CANNOT BE CHANGED BY THE GOVERNMENT'S EXPEDITIOUS INTERPRETATION OF THE STATUTE OR BY VAGUE ADMINISTRATIVE PRACTICES.

(a) There Must Be A Hearing Within the Five Year Period.

Zaoutis has argued that the sending of a letter is not relevant and that Section 246(a) of the Immigration and Nationality Act (hereafter the "Act") 8 U.S.C. § 1256(a) requires the Attorney General to be satisfied within five years that the alien was not, in fact, eligible (PM16), and that this statutory requirement mandates, at the very least, that the Attorney General conduct a hearing within the prescribed period (PM17).

The United States Attorney has not really attempted to meet this argument based on what we believe is a plain reading of the statute and the rationale of the Quintana case. The Government's lead argument is that the notice of intention to rescind is analogous to a criminal information or indictment and when it is issued by the District Director it tolls the statute of limitation (GM8). We do not know the relevance of the notice of intention being "an instrument

analogous to a criminal information or indictment", but this argument is completely misplaced because a criminal information or indictment tolls the statute of limitation because Congress has specifically provided that it shall toll the statute of limitations. Thus, as we pointed out in our memorandum (PM22), a typical statute provides, "no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed". 18 U.S.C. § 3282.

Clearly, if Congress wished Section 246(a) of the Act to be tolled by the filing of an instrument by the District Director, it could have specifically said so. Moreover, if the Attorney General had so interpreted the statute, he could have said so in the regulations promulgated by its delegates. However, as we have previously indicated, there is absolutely no mention in the applicable regulations that the issuance of a Notice of Intent tolls any statute whatsoever. (PM29-32).

(b) Assignment of Rescission Matters to Special Inquiry Officers Cannot Change the Terms of the Statute.

The Government next appears to argue that the assignment of rescission matters to Special Inquiry Officers or Immigration Judges many years after the enactment of the statute, by

administrative fiat somehow should influence this Court's interpretation of the statute as enacted by Congress. Thus, the Government argues that the assignment of rescission matters to a Special Inquiry Officer prevents dilatory practices and abuses that might be inherent by allowing the District Director to toll the statute by filing or serving a notice of intention to rescind. The Government also argues that this makes the rationale of Quintana v. Holland, supra, inapposite, as of that time rescission matters were decided by Immigration Officers who were not Special Inquiry Officers.

Initially, it should be abundant that the administrative action of an agency many years subsequent to the enactment of a statute by Congress should have no effect whatsoever on the interpretation of that statute by this Court. However, it might be helpful to really examine exactly what the Government is talking about. After the 1952 legislation enacting the rescission proceeding, rescission matters were assigned to "adjudicators". Adjudicators were Immigration Officers and like many other Immigration Officers, were assigned to the staff of the applicable District Director. They, like other Immigration Officers and Immigrant Inspectors, presided over the bulk of immigration hearings or adjudications. They were, of course, required to make independent decisions and not be

improperly influenced by the prosecutorial arm of the District Director. It was true that these Immigration Officers were technically on the staff of the District Director and perhaps, theoretically, could be subject to unwarranted abuse and influence of a District Director. Of course, there is no evidence that this influence or abuse ever transpired and that fact is not assumed in the third circuit's decision in Quintana v. Holland. The rationale of the third circuit in Quintana v. Holland was simply that some officer had to conduct some type of hearing prior to the expiration of the five year period. Of significance in the instant case is that no officer, whether it was an Adjudicator or a Special Inquiry Officer conducted any type of hearing prior to the expiration of the five year period.

The Government also appears to argue that the role of the Special Inquiry Officer in the adjudication process prevents an abuse of process that might be inherent in allowing the District Director to toll the five year period by filing a Notice of Intent. We think this argument is particularly inapposite, as the Special Inquiry Officer never gets to hear a rescission matter until it is referred to him by the District Director (see the Riesel affidavit of August 4, 1976 filed herewith). Accordingly, if the District

sought to extend his time to gather facts, he could easily do so by sending out the Notice of Intent to Rescind. If an alien was sufficiently sophisticated to request a hearing, the District Director could still sit on a matter and then subsequently refer it to a Special Inquiry Officer at the time that he believed that he had amassed sufficient evidence to pursue his case before a Special Inquiry Officer. Of course, there are no time limits set forth in the administrative procedure that would require a District Director to promptly send the matter to a hearing officer.

In this regard the facts of the instant case are particularly instructive. The Notice of Intent to Rescind was mailed on or about May 20th, 1970. Zaoutis retained an attorney and on June 10th, 1970 filed a letter demanding a hearing and suggesting that the hearing be held either prior to June 29th, 1970 or after July 27th, 1970. However, the Government did not convene a hearing until June 2nd, 1971. almost a year after the statute had run. For the first time we obtained some idea why the Government procrastinated for this unduly long period of time. The Government has attached to the affidavit of the Special Assistant United States Attorney in charge of this matter, a memorandum dated September 9th, 1970 which indicates that a certain, Arthur Winoker, Assistant Counsel, Coordinating Committee on Discipline,

requested the immigration service "to hold in abeyance the pending rescission proceeding against the subject until the completion of" the Disciplinary Committee investigation into the alleged professional misconduct of an attorney that apparently was involved in certain marriage frauds. There after, the Government procrastinated and delayed the proceeding for several more years. On one occasion, the plaintiff was visiting his wife outside of the United States and requested a brief adjournment of several months until he could return. It is disingenuous of the Government to contend, as it does in its memorandum, that the rescission hearing proceeded with dispatch.

(c) Statutory Construction Favors the Plaintiff.

The United States Attorney argues that the Notice of Intention to Rescind is "analogous to a criminal information or indictment" (GM8). However, he next urges "that statutes of limitations sought to be applied to bar rights of the Government must receive a strict construction in favor of the Government...." (GM11). In support of this dubious proposition, the United States Attorney cites four inapposite and hoary cases involving the Government's efforts to recover land or money (GM11-12). We submit that the Courts have

consistently held that immigration statutes that may result in deportation are to be liberally construed in favor of the alien. (See cases cited at PM14-15).

The United States Attorney next urges that "great deference" should be given to the construction of a statute by the agency charged with its administration (GM17). We submit that this standard Governmental argument is often an indication of a failure of reason or an absence of legislative intent to support its position. At any rate, reviewing Courts are not obligated to stand aside and rubber stamp agency positions that are inconsistent with the Congressional mandate. N.L.R.B v. Brown, 380 U.S. 278 (1965).

Moreover, this Court is asked to decide an issue of law, and in such cases "reviewing courts are not obligated to grant any deference to the agency decision." Lodges 743 and 746, International Ass'n. of Machinists, etc. v. United Aircraft Corp., 534 F.2d 422, 452 (2'd Cir. 1975).

We can see no reason why the Attorney General's delegates have any geater insight into what Congress intended than this Court. Indeed, the defendants have not pointed to any reasons, legislative history or policies that would indicate that they harbor any particular insight to the construction problem by virtue of their obligation to administer the Act. Indeed,

it is their very closeness to the Act that creates a suspicion that this construction is indicative of a myopic attitude.

Perhaps this myopic view is the reason that this circuit, and other federal courts have not been hesitant to strike down longstanding service interpretation of the Act. See e.g. Menon v. Esperdy, 413 F.2d 644, 413 F.2d 644 (2d Cir. 1969).*

* See also, for example: Zamara v. Immigration and Naturalization Service, 534 F.2d 1055 (2d Cir. 1976); Francis v. Immigration and Naturalization Service, 532 F.2d 268 (2d Cir. 1976); Kovac v. Immigration and Naturalization Service, 407 F.2d 102 (9th Cir.1969); Lau v. Kiley, 410 F.Supp. 221 (S.D.N.Y., 1976)

CONCLUSION

The plaintiff should have summary judgment.

Dated: New York, N.Y.
August 5, 1976.

Yours, etc.,

Schiano & Wallenstein, and
Daniel Riesel, of Winer
Neuburger & Sive

By Daniel Riesel
Daniel Riesel

A 233

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

STEFANOS ZAOUTIS,

Plaintiff,

-against-

MAURICE F. KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and the IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

- -x

75 Civ. 2783 (IBW)

AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
)SS:
COUNTY OF NEW YORK)

DANIEL RIESEL, being duly sworn deposes and says:

1. I am one of the attorneys for the plaintiff and movant herein, Stefanos Zaoutis. I submit this affidavit in opposition to the Government's motion for summary judgment and in support of the plaintiff's motion for summary judgment. The facts recited herein are based on my personal knowledge, or upon information and belief and the basis for that information and belief is my familiarity with the practices of the United States Immigration and Naturalization Service.

2. The main thrust of the Government's argument is that current administrative practices provide some insight into the congressional intent behind legislation enacted in 1952. In this vein, the Government argues that the existence of independent hearing officer is a safeguard against abuses, and renders the underlying rationale in Quintana v. Holland, 255 F.2d 161 (3rd Cir.1958) inapposite.

These agruments are not supported by the applicable law and the relevant facts as the following paragraphs will demonstrate.

3. Initially, the issue before this Court is the construction of a statute which involves ascertaining the legislative intent. The adoption of a new administrative practice (adjudication by Special Inquiry Officers) many years after a statute has been enacted cannot shed light on legislative intent and consequently is not relevant.

4. At the time that Quintana v. Holland, supra, was decided rescission matters were decided by Immigration Officers who were commonly known as "adjudicators". Adjudicators primarily conducted hearings or made determinations in rescission and other immigration proceedings. They were, like the successor Special Inquiry Officers, required to exercise independent judicial action. They were on the staff of the local District Director and, theoretically, could be a subject to improper pressures exerted by the District Director. However, there is no proof or reason to believe that such improper action was taken.

On the other hand, Special Inquiry Officers or Immigration Judges, as they are currently known, are not on the staff of the District Director. Nevertheless, there is absolutely no reason to believe that a District Director who would be so unscrupulous as to exert undue pressure upon an adjudicator would not be able to cause a similar delay even though the rescission would eventually be assigned to a Special

Inquiry Officer. Thus, Special Inquiry Officers are not aware that a Notice of intent has been sent or that a request for a hearing has been made by an alien until the District Director refers the matter to the Special Inquiry Officer for adjudication. Accordingly, there is no reason to believe that a District Director motivated by improper reasons would not be able to issue a Notice of Intent, and then go out and dig up sufficient evidence to obtain his case before referring the entire matter to a Special Inquiry Officer.

5. Moreover, the thrust of the Government's position is that the alien, if he is sufficiently informed of his rights could protect himself by demanding a speedy hearing. In this regard, it should be remembered that alien respondents are often unfamiliar with the intricate procedures of practice before the U.S. Immigration and Naturalization Service, and quite often cannot afford counsel. Of course, aliens have absolutely no right to have counsel furnished by the Government as they would in criminal cases.

6. Accordingly, these arguments advanced by the United States Attorney really have no basis in fact, law or practice. Certainly, current practice cannot distinguish Quintana v. Holland which, of course, does not really turn on what the name of the officer deciding the case is, but does stand for the proposition that the statutory terms require some form of a hearing prior to the five year term expiring.

A 236

7. In this regard, the Government's papers indicate that the Special Inquiry Officer did not conduct a factual hearing or receive any evidence prior to the five year period. The only Governmental activity was the activities of a Service Investigator tracking down informants.

8. We note that the Service has adopted procedures that do not conform to the statute. However, the Service undoubtedly could adopt regulations that would carry out the Congressional intent and protect the divergent interests of the Service and alien. The Service has not done this, but stubbornly clings to an inadequate regulation that tends to ignore the statutory prescriptions.

9. The United States Attorney served its answer to the complaint herein on or about July 20, 1976. Accordingly, the United States is in default and an answer served thirteen months after the complaint herein was filed does not cure such default. Similarly, the Government failed to make a full and complete disclosure pursuant to the plaintiff's notice of oral deposition and notice to produce documents. However, the Government now appears to rely on its partial disclosure. It cannot have it both ways. A failure to respond to a notice to produce certainly precludes the Government from selecting certain documents from the administrative file and urging the Court to rely on those documents conveniently selected by Government's counsel.

Daniel Riesel

Sworn to before me this
4 day of August, 1976.

Notary Public, State of New York
No. 41-4618072
Cert. Filed in Queens County
Commission Expires March 30, 1977

A 237

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

Filed 8/11/76

STEFANOS ZACOUTIS,

Plaintiff,

-against-

75 Civ. 2783

MAURICE KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and the IMMIGRATION AND NATURALIZATION SERVICE,

44959

Defendants.

- x

APPEARANCES:

SCHIAMO & WALLENSTEIN, ESQS. and
DANIEL RIESEL, ESQ. of
WEBER, NEUBURGER & SIVE, ESQS.
Attorneys for Plaintiff
425 Park Avenue
New York, New York 10022

ROBERT B. FISKE, JR., ESQ.
United States Attorney for the
Southern District of New York,
Attorney for Defendants.

THOMAS H. BELOTE, ESQ.
Special Assistant United States Attorney
Of Counsel

WYATT, District Judge,

This is a motion by plaintiff for summary judgment and a cross-motion by defendant District Director for the same relief. Fed. R. Civ. P. 56

Plaintiff Zacoutis is an alien. He entered this country lawfully on November 6, 1963, as a non-immigrant

A 238

visitor. He worked for a time for the Greek Government as a doorman at the consulate in New York City.

On January 10, 1965, Zaoutis married Camacho, a United States citizen.

On August 25, 1965, the status of Zaoutis was "adjusted" by the Service to that of an "alien lawfully admitted for permanent residence". 8 U.S.C. § 1255(a) The basis for the adjustment was his marriage to a United States citizen.

On April 5, 1967, Zaoutis got a Mexican divorce from Camacho and on October 1, 1967 he married Gaglia, a Greek citizen.

The Service then conducted an investigation of fraudulent marriages to secure immigration benefits. Eventually the Service believed it had sufficient evidence to establish that the marriage of Zaoutis and Camacho was fraudulent.

1.

The law provides (8 U.S.C. § 1256(a)) in relevant part as follows:

> "If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 1255 . . . of this title . . . to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person . . . and the person shall thereupon be subject to all provisions of this chapter to the same extent as if the adjustment of status had not been made."

A 239

2.

Under date of May 20, 1970, the District Director of the Service served Zacutis with a "notice of intention to rescind" his adjustment of status. The procedure was as provided in Regulations, specifically 8 CFR 246.1. In this notice there is no statement that it had appeared "to the satisfaction of the Attorney General" [or a designated representative, such as the District Director] that Zacutis "was not in fact eligible for . . . adjustment of status". On the contrary, the notice states that it is "alleged" and that it is "charged" that Zacutis was not in fact eligible for adjustment of status. The Regulations (8 CFR 246.1), however, provide that "if it appears to a district director that a person residing in his district was not in fact eligible for the adjustment of status made in his case, a proceeding shall be commenced by the service upon such person of a notice of intention to rescind . . .", etc.

The quoted Regulation partly tracks the language of the statute (8 U.S.C. § 1256(a)) as to it appearing that the alien "was not in fact eligible . . .", etc. and substitutes "district director" for "the Attorney General" as used in the statute. It seems clear, however, that the determination and notice by the district director which commences the proceeding is not a delegated determination under the statute which requires rescission of the adjustment of status. The object of the proceeding under the Regulations is to determine

whether the alien "was not in fact eligible for such adjustment of status" (8 U.S.C. § 1256(a)), a determination made for the Attorney General by the Board of Immigration Appeals after an initial decision of a special inquiry officer. 8 CFR 3.1, 246.6, 246.7

Under date of June 10, 1970, counsel for Zaoutis requested a hearing, asked to be either before or after the period June 29 - July 27, 1970, when counsel would be out of the country. No hearing was set by the Service, however, in part because, we are told, there was "a request by a Bar Association disciplinary committee investigation" (Belote affidavit, ¶ 14).

The five year limitation of 8 U.S.C. § 1256(a) expired on August 25, 1970.

The administrative hearing was commenced on June 2, 1971. Counsel for Zaoutis moved to terminate the proceedings as barred by the five year statute of limitations in 8 U.S.C. § 1256(a), relying also on the decision of Chief Judge Harris in Singh v. I. & N., 313 F.Supp. 532 (N.D.Calif.) which had been decided on May 27, 1970. Decision was reserved on the motion and the hearing was "adjourned without date".

The hearing resumed on April 10, 1972. At the outset, the motion on the statute of limitations was denied, the administrative judge basing his ruling on the reversal by the Ninth Circuit Court of Appeals of the Singh decision below (456 F.2d 1092, cert. denied, 409 U.S. 847 (1972)), which had taken place

on February 24, 1972. Evidence was then taken and also at hearings on October 2, 1973, and February 7, 1973, at which time the hearing was closed.

By opinion and order dated October 15, 1973, the administrative judge found that the marriage of Zacutis and Camacho was fraudulent, that he was not in fact eligible for adjustment of status, and that such adjustment was rescinded.

Zacutis took an appeal, contending solely on the statute of limitations.

By order and opinion dated May 2, 1974, the Board rejected this contention and dismissed the appeal.

3.

It seems perfectly clear to me that it was on May 2 , 1974, that it appeared "to the satisfaction of the Attorney General" that Zacutis "was not in fact eligible for . . . adjustment of status". Since this date was long after the five year limitation in 8 U.S.C. § 1256(a), the rescission of the adjustment of status of Zacutis is barred by that limitation.

4.

It is agreed by both sides that there is no genuine issue as to any material fact. If the rescission by the Service was time barred, there must be summary judgment for movant & plaintiff Zacutis. If the rescission is not time barred, there must be summary judgment for defendants.

A 242

5.

Decision turns on whether service on May 10, 1970, of a notice of intent to rescind is equivalent to a determination by the Attorney General that Zaoutis was not in fact eligible for adjustment of status. Defendants urge that it is; Zaoutis contends that it is not.

Singh v. I.& S. in the Ninth Circuit, above cited, fully supports the defendants but, after careful consideration and with great deference to the able Ninth Circuit panel, I cannot accept the result. The Ninth Circuit simply found the practical consequences of the statute to be "absurd" (456 F.2d at 1097). Such consequences, if true, do not justify rewriting the statute. As it stands, the statute has a plain bar to rescission. If this be an example of a bad policy, the solution is to ask Congress to change the statute.

The Third Circuit in Quintana v. Holland, 255 F.2d 161 (3d Cir. 1958), reaches a conclusion contrary to that of the Ninth. The reasoning of Judge Goodrich is more persuasive to me than that of the Ninth Circuit.

The Second Circuit does not appear to have considered the problem. Pierno v. I.& S., 397 F.2d 949 (2d Cir. 1968) has been studied but does not seem in point.

6.

The defendants, by able counsel, have made convincing arguments that to apply the five year statute of limitations as written would lead to injustice and would be contrary to sound

public policy. These arguments have merit but they should be addressed to Congress. As a judge, I should not rewrite the legislation.

A very great teacher has said (Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527, 533 (1947)):

> "Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, either to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction."

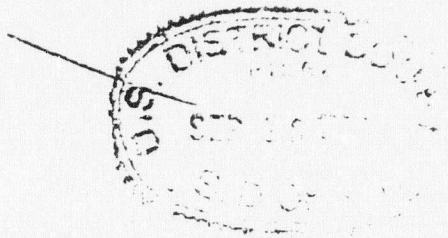
The motion of plaintiff Zaoutis is granted. The cross-motion of defendants is denied. Settle Order.

Dated: New York, New York
August 11, 1976

/s/

IRVING B. WYATT
United States District Judge

A 244



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

STEFANOS ZAOUTIS,

Plaintiff,

-against-

MAURICE KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and the IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

----------x

75 Civil 2783 (IFG)

ORDER AND JUDGMENT

WHEREAS, the plaintiff, Stefanos Zaoutis, having moved this Court on June 21, 1976 for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure entering summary judgment in favor of the plaintiff, and

The motion for summary judgment having come on to be heard for oral argument before this Court on August 6, 1976, and the plaintiff having appeared by his attorneys Schiano & Wallenstein, Esqs. and Daniel Riesel, Esq., by Daniel Riesel, and the defendants having appeared by its attorney, the United States Attorney for the Southern District of New York, Thomas Belote, Special Assistant United States Attorney, and

The Court having heard oral argument, and having considered the affidavit of Daniel Riesel, dated June 21, 1976, and plaintiff's memorandum of law in support of the motion for

A 245

summary judgment, and having considered the affidavit of Thomas Belote, Special Assistant United States Attorney, and the defendants' memorandum of law in opposition to the motion, and further after hearing oral argument, it is

ORDERED and ADJUDGED, that the plaintiff Stefanos Zaoui[illegible] have judgment against the defendants, Maurice Kiley, as District Director for the New York District of the Immigration and Naturalization Service, the Immigration and Naturalization Service, and it is further

ORDERED and ADJUDGED, that the order of deportation entered against the plaintiff, Stefanos Zaoui[illegible] the defendant, Immigration and Naturalization Service be and it is hereby declared null and void.

Dated: New York, New York
September [illegible], 1976.

U.S.D.J.

BEST COPY AVAILABLE

9-14-76

1st Raymond F. Burghardt

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By [illegible]
Deputy Clerk

A 246

THB:ml
75-2021

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

STEFANOS ZAOUTIS,

Plaintiff,

- v -

MAURICE F. KILEY, as District Director for the New York District of the Immigration and Naturalization Service, and IMMIGRATION AND NATURALIZATION SERVICE,

Defendants.

- x

Filed 11/15/76
m f/a

NOTICE OF APPEAL

75 Civ. 2788 (IBW)

Notice is hereby given that Maurice F. Kiley and the Immigration and Naturalization Service, defendants above-named, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 14th day of September, 1976.

Dated: New York, New York

November 12, 1976.

ROBERT B. FISKE, Jr.,
United States Attorney for the
Southern District of New York
Attorney for Defendants

By: _____
THOMAS H. BELOTE
Special Assistant United States
Attorney
Office & P.O. Address:
United States Courthouse Annex
One St. Andrew's Plaza
New York, New York 10007
Telephone: (212) 791-9166

To: Daniel Riesel, Esq.
Winer, Neuberger & Sive
425 Park Avenue
New York, New York 10022